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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 153

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1962

No.....

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Earl Warren,
Chief Justice of the United States,
and the Associate Justices of the
Supreme Court of the United States:

Petitioner, Trunkline Gas Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause January 9, 1963.

OPINION BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals (R. 238-243) is reported at 311 F. 2d 882. The opinion and judgment of the Court of Appeals are set out in full in Appendix A, *infra*, pp. 15-21.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1963 (R. 244). Petitioner timely filed its petition for rehearing on January 26, 1963 (R. 245-263), and the Court of Appeals overruled such petition by order entered on February 27, 1963 (R. 275). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether Texas counties have legal authority to compensate for casing of pipe lines in private easements when the casing is required for construction of new State highway facilities across such easements.

2. Whether a requirement that a pipe line be cased under a private pipe line easement by its owner, for new highway construction by the State across the easement, constitutes a taking of the easement.

STATUTES INVOLVED

The pertinent statutes are Vernon's Annotated Civil Statutes, Articles 6673, 6674c-1, 6674n and 6674q-4. Such statutes, together with the volume and page where each may be found in the official edition, are set out in Appendix B, *infra*, pp. 22-25.

STATEMENT

This suit, in which federal jurisdiction is based upon diversity of citizenship, was brought by Petitioner, a natural gas pipe line company incorporated under the laws of Delaware, to recover the cost of casing its pipe line required for the construction of new highway facilities on right of way acquired by Respondent, a county of the State of Texas, across Petitioner's pipe line easements and the line located therein. (R. 2-8)

In 1951 Petitioner purchased pipe line easements from the owners of lands abutting U. S. Highway 69 and F. M. Highway 418 in Hardin County, Texas, and constructed its pipe line thereunder (R. 14, 19, 233-235). Petitioner also constructed its line under and across each of said highways and at the time cased that portion of its line under the entire width of the highway rights of way as same then existed (R. 14, 19).

Thereafter, the State Highway Department determined to widen said highways, which necessitated the acquisition of new and additional rights of way. Such new and additional rights of way crossed Petitioner's pipe line and easements. The State Highway Department required that Respondent, at its own cost, acquire the necessary additional rights of way across Petitioner's pipe line and easements for the two construction projects free and unencumbered and free of all obstructions and encroachments, without any cost or expense to the State (R. 86, 104, 125-127). Respondent agreed and undertook so to acquire said new rights of way (R. 103, 115, 130, 141, 149, 204, 255).

Because the uncased pipe line constituted an obstruction in the new highway rights of way (R. 86, 104, 115), the Highway Department required that Petitioner's pipe line be cased under those portions of Petitioner's private easements to be crossed by the new highway facilities, and requested that Petitioner install the required casing (R. 87, 95, 112, 126, 190-194, 214-217, 218). Petitioner refused to do the casing without assurance that it would be reimbursed for the cost of the work (R. 15, 20, 197, 219). The Highway Department officials considered the matter of Petitioner's compensation for casing its pipe line under the new highway rights of way to be a part of Respondent's responsibility to acquire the rights of way as above set out (R. 83-87, 101-105, 115, 125-127). Therefore, when Petitioner raised the ques-

tion of compensation, the officials referred it to Respondent (R. 117-118, 126-127, 198).

The Highway Department would not begin construction until the casing was done (R. 127). So, Respondent then undertook to have Petitioner's line cased under the new highway rights of way and requested that Petitioner do the work without compensation. (R. 16, 21, 130-131, 141, 180-182, 220, 226). In this connection, Respondent's County Judge admitted that the County was the proper agency to have Petitioner's pipe line cased (R. 181) and that Respondent had handled such matters in connection with these and other highway construction projects (R. 132, 136, 181, 182).

Petitioner again refused to case the portions of its pipe line in its private easements to be crossed by the new highway rights of way without compensation (R. 16, 21, 142, 202, 227). Because of Petitioner's refusal to install casing under the new right of way for Highway 69, Respondent's Commissioners' Court adopted an order on May 23, 1955, providing:

> "Trunkline Gas Company is authorized to extend the casing of their pipelines across U. S. Highway Sixty-nine at County expense . . ." (R. 149)

And because of Petitioner's refusal to install casing under the new right of way for Highway 418, the Commissioners' Court adopted an order on May 27, 1957, providing:

> "Hardin County will pay, according to law all legal claims fixed against it, for the casing, lowering and re-location of all pipe lines in existing and proposed Farm-to-Market and State Highway rights-of-way, when not otherwise compensated." (R. 228)

However, Respondent made no effort in either instance to purchase or condemn Petitioner's private easements or any right or interest therein.

In express reliance upon the orders of the Commissioner's Court and the correspondence relating thereto (R. 205-207, 227-230), which set forth Respondent's agreements to reimburse, Petitioner did the casing requested (R. 17, 22). The new highway facilities were then constructed. But notwithstanding its agreements, Respondent refused to pay Petitioner's claims for the cost of casing, and Petitioner filed this suit for breach of contract and for compensation for the taking and damaging of its property in violation of both the United States and Texas Constitutions.

Both parties filed motions for summary judgment (R. 12, 27). The District Court granted Petitioner's motion and rendered judgment for Petitioner (R. 35-36) upon findings of fact and conclusions of law (R. 64-71). The Court of Appeals reversed the District Court's judgment and remanded the cause with directions that judgment be entered for Respondent (R. 244). Petitioner timely filed a petition for rehearing (R. 247), which was overruled on February 27, 1963 (R. 275).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the applicable law of Texas on an important question of Texas law which affects all of the 254 counties of the State traversed by large numbers of pipe lines across which State highways are and will be constructed. The court below held that a Texas county has no legal power to compensate for the casing of pipe lines in private easements under rights of way acquired by the county for State highway construction because same does not come within the statutory authority of the county to acquire such rights of way under Vernon's Ann.Civ.Stats., Articles 6674n and 6674q-4. This construction of the Texas

statutes conflicts with that of the Texas Courts of Civil Appeals and that of the State officials charged with the administration and construction of such laws.

In *McLennan County* v. *Sinclair Pipe Line Company*, 323 S.W.2d 471 (Tex.Civ.App., Waco, 1959, error refused n.r.e.),[1] the county undertook to furnish free of cost to the State, the right of way for State highway construction across the pipe line company's easement. As a part of its acquisition of the right of way for the State, the county requested that the company lower its pipe line which was located in the company's private easement. The company refused until the county agreed that the company's right to compensation would not be lost by its proceeding with the work, and then, when the lowering of the line was completed, the company sued the county for its costs. Thus, the facts in that case are not distinguishable from those presented here.

McLennan County, like Respondent and the court below in this case, relied on *Sinclair Pipe Line Company* v. *Archer County*, 147 F.Supp. 650 (N.D. Tex., 1956), affirmed 245 F.2d 79 (5th Cir., 1957), and asserted that having the pipe line lowered was not within its statutory duty to acquire the right of way. The Court of Civil Appeals in the *McLennan County* case refused to follow the federal courts' holding in the *Archer County*, case, that Archer County had no statutory power to pay for pipe line casing. The Texas court held that the pipe line company was not entitled to compensation in the *Archer County* case only because it had been a volunteer and had waived its rights. There being no waiver in its case, the Court of Civil Appeals then held that McLennan County was required to pay and, therefore, necessarily, had legal power to pay for the lowering of the

[1] For the convenience of the Court, the pertinent portions of this decision are quoted in Appendix C, *infra*, pp. 26-29.

pipe line as a part of the County's acquisition of the highway right of way for the State. As noted, the Texas Supreme Court approved the result of the *McLennan County* case by refusing to review the decision of the Court of Civil Appeals.

Sinclair Pipe Line Company v. *State*, 322 S.W.2d 58 (Tex. Civ.App., Fort Worth, 1959),[2] was a condemnation suit brought by Montague County in the name of the State to compel the pipe line company to lower and case its lines. In that case, also, the Court of Civil Appeals held that the county was required, and so had the legal power, to pay compensation for the pipe line adjustments. And, in the most recent Texas case on this question, *Magnolia Pipe Line Company* v. *City of Tyler*, 348 S.W.2d 537 (Tex.Civ.App., Texarkana, 1961, error refused),[3] the Court of Civil Appeals held that counties and cities in Texas may be required to compensate for adjustments of pipe lines crossed by new streets or highways and, therefore, have power to do so.

These decisions of the Waco, Fort Worth and Texarkana Courts of Civil Appeals were all subsequent to the opinions of the district court and Court of Appeals in *Sinclair Pipe Line Company* v. *Archer County, supra.* Even though the Courts of Civil Appeals are intermediate State appellate courts, the Court of Appeals was obligated to follow their decisions on the question of Texas law presented in this case. *State of California* v. *Taylor*, 353 U.S. 553, 556 (1957); *Fidelity Union Trust Company* v. *Field*, 311 U.S. 169, 177-178 (1940); *Six Companies of California* v. *Joint Highway District No. 13*, 311 U.S. 180, 188 (1940); *West* v. *American Telephone & Telegraph Company*, 311 U.S. 223, 236-237

[2] For the convenience of the Court the pertinent portions of this decision are quoted in Appendix C, *infra*, pp. 29-33.

[3] For the convenience of the Court the pertinent portions of this decision are quoted in Appendix C, *infra*, pp. 33-36.

(1940). Its refusal to follow these Texas decisions was error and places its decision on an important question of Texas law in conflict with the Texas courts.

In addition to disregarding the decisions of the Texas courts, the court below also ignored the long-established construction of the pertinent Texas laws by the State officials charged with the duty on construing and administering them. It is undisputed in the record of this case that the officials of the State Highway Department have construed the matter of compensation for pipe line adjustments to be a part of the acquisition of highway rights of way by the counties (R. 83-87, 101-105, 126-127). Even Respondent's County Judge admitted Respondent was the proper agency to have Petitioner's line cased (R. 181). Moreover, the Attorney General of Texas has consistently held ever since 1940 that a Texas county is authorized and required to compensate for adjustment of pipe lines in private easements which are required to accommodate the construction of highway facilities across existing pipe lines. Opinion No. WW-1090, July 12, 1961; Opinion No. WW-1004, March 6, 1961; Opinion No. WW-125, May 22, 1957; Opinion No. O-2405-A, October 9, 1940.[4]

Under the decisions of this Court and the Texas courts, the Court of Appeals was required not to ignore but to give great weight and respectful consideration to the construction of the Texas laws by the Highway Department and the Attorney General of Texas. *Driscoll* v. *Edison Light & Power Company*, 307 U.S. 104, 115 (1939); *Fox* v. *Standard Oil Company of New Jersey*, 294 U.S. 87, 96 (1935); *The Union Insurance Company* v. *Hoge*, 21 How. 35, 66 (1859); *Farrier* v. *Calvert*, 315 S.W.2d 40, 42 (Tex.Civ.App., Austin, 1958, error refused n.r.e.); *Gaynor Const. Co., Inc.* v. *Board of Trustees*, 233 S.W.2d 472, 478 (Tex.Civ.App.,

[4] For the convenience of the Court, all of these Opinions of the Attorney General of Texas are set out in full in Appendix D, *infra*, pp. 37-52.

El Paso, 1950, error refused); *Trinity Portland Cement Co.* v. *State*, 144 S.W.2d 329, 335 (Tex.Civ.App., Beaumont, 1940, error refused).

Further, the Court of Appeals refused to consider Vernon's Ann.Civ.Stats., Article 6674c-1, which expressly provides that a Texas county has the authority to make voluntary contributions to the State Highway Department for the "development" of highways in such county, as well as its authority to acquire rights of way for such highways under Articles 6674n and 6674q-4. Article 6674c-1 contains no restrictions on the use to which a county's funds may be put. So, under this statutue, a county may certainly furnish the necessary funds to the State Highway Department to compensate for pipe line adjustments required for highway construction. And, it has been determined that what may be done indirectly through the Highway Department, may also be done directly by the county or other political subdivision involved. *Clark* v. *Greer*, 232 S.W.2d 876 (Tex. Civ.App., Dallas, 1950). However, the Court of Appeals completely disregarded Article 6674c-1 and the construction thereof by the Dallas Court of Civil Appeals in the *Clark* case, which it was obligated to follow.

The Court of Appeals in this case rested its decision, that Respondent has no power to compensate upon Vernon's Ann.Civ.Stats., Articles 6673 and 6674q-4, and upon the opinion of the federal district court in *Sinclair Pipe Line Company* v. *Archer County, supra.* Article 6673 was first enacted in 1923[5], and re-enacted in its present form in 1925[6]. Insofar as it prohibits the expenditure of county funds for State highways, Article 6673 has been repealed by the 1929 amendment of Vernon's Ann.Civ.Stats., Article 6674n[7], and

[5] Acts 1923, 38th Leg., Ch. 75, Sec. 20, p. 161.

[6] Rev. Stat., 1925, Art. 6673.

[7] Acts 1929, 41st Leg., 3rd C.S., Ch. 10, p. 243.

the enactment in 1932 of Vernon's Ann. Civ. Stats., Article 6674q-4,[8] providing for the acquisition of rights of way by the counties, and by the adoption in 1947 of Vernon's Ann. Civ.Stats., Article 6674c-1,[9] providing for county contributions for highway development. Insofar as Article 6674q-4 limited the expenditure of county funds to the acquisition of rights of way, it also, of course, was repealed by Article 6674c-1.

In *Sinclair Pipe Line Company* v. *Archer County, supra,* which was decided before any Texas court had written on the question of compensation for pipe line adjustments, the district court relied upon the same statutes cited by the Court of Appeals in this case, and it is clear that neither the district court in that case nor the Court of Appeals in this case correctly followed the legislative history of the statutes they cited. In any event, after the decision of the *Archer County* case, the Texas courts decided the questions here presented to the contrary,[10] and the Highway Department officials[11] and the Attorney General of Texas[12] continued to construe the laws as authorizing and requiring Texas counties to pay compensation for pipe line adjustments such as those involved here.

The Court of Appeals in this case has simply followed its decision in *Sinclair Pipe Line Company* v. *Archer County, supra.* In adhering to the *Archer County* decision, the Court of Appeals has completely ignored the intervening decisions of the Texas courts, their construction of the

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[8] Acts 1932, 42nd Leg., 3rd C.S., Ch. 13, Sec. 14, p. 17.

[9] Acts 1947, 50th Leg., Ch. 18, p. 25.

[10] *Magnolia Pipe Line Company* v. *City of Tyler, supra; McLennan County* v. *Sinclair Pipe Line Company, supra; Sinclair Pipe Line Company* v. *State, supra* (Appendix C, *infra,* pp. 26-36).

[11] R. 83-87, 101-107, 126-127.

[12] Opinion No. WW-1090, July 12, 1961; Opinion No. WW-1004, March 6, 1961; Opinion No. WW-125, May 22, 1957; all of which are set out in Appendix D, *infra,* pp. 37-52.

applicable State laws, and the application of such laws by responsible State officials. Its decision stands in direct conflict with Texas Law. Accordingly, it is submitted that the writ of certiorari herein prayed should be granted. Whether a county has power to pay for adjustments of pipe line and utility facilities in private easements, when the adjustments are required for new State highway construction, is a vitally important question to all 254 counties of the State, to the State Highway Department, and to the pipe line and utility companies. This is obvious and requires no argument. The question will arise in virtually every instance of new highway construction in Texas.

2. The decision of the Court of Appeals conflicts in principle with the decision of this Court in Panhandle Eastern Pipe Line Company v. State Highway Commission of Kansas, 294 U.S. 613 (1935), and with the decision of the Court of Appeals for the Seventh Circuit in Buckeye Pipe Line Company v. Keating, 229 F. 2d 795 (7th Cir., 1956), cert. den. 352 U.S. 830, as well as those of the Texas courts.

The Court of Appeals held that Respondent's actions, in securing the casing of Petitioner's pipe line under the portions of Petitioner's private easements crossed by the new highway facilities, did not constitute part of Respondent's acquisition of new rights of way. Essential to this holding was a determination that there was no taking or acquisition by Respondent of the pipe line easements which Petitioner had previously purchased from the fee owners of the land. For, as Respondent correctly conceded in its brief in the court below:

> *"Taking and acquisition of right-of-way are synonymous."*

Respondent then contended that there was no taking of Petitioner's easements and therefore no acquisition for

which Respondent had authority to pay. The Court of Appeals necessarily adopted this contention, and in so doing, it placed its decision in conflict with those of this Court and the Seventh Circuit.

In *Panhandle Eastern Pipe Line Company* v. *State Highway Commission of Kansas, supra*, the material facts of which are not distinguishable from those in this case, this Court held (294 U.S. at p. 618):

> "If carried into effect, the challenged order of the Commission would result in *taking* private property for public use. [Citing cases.] *A private right of way is an easement and is land.* [Citing cases.] No compensation was provided for; none was intended to be made. Ordinarily, at least, such *taking* is inhibited by the Fourteenth Amendment." (Emphasis supplied.)

In *Buckeye Pipe Line Company* v. *Keating, supra*, also decided upon similar facts, the Court of Appeals for the Seventh Circuit followed the *Panhandle* case, *supra*, and held (229 F.2d at p. 798):

> "An *easement* is an interest in real property. It is expressed not in terms of possession or occupancy but in terms of use. Therefore, *the property of the owner of an easement is taken from him* not necessarily when the adverse party occupies the land, but only when he prevents or interferes with the owner's use of the easement. *When that occurs there has been a taking of property from the owner of the easement just as much as if an adverse party had taken real estate which another owned in fee.*" (Emphasis supplied).

Accordingly, the conflict between the decision below and both the *Panhandle* case, *supra*, and the *Buckeye* case, *supra*, is direct and clear.

Moreover, the Texas Courts of Civil Appeals have uniformly followed the *Panhandle* case, *supra*, and the *Buck-*

eye case, *supra*, and have held a requirement that a pipe line in a private easement be cased constitutes a taking of the easement. *Magnolia Pipe Line Company* v. *City of Tyler*, *supra*; *McLennan County* v. *Sinclair Pipe Line Company*, *supra*; *Sinclair Pipe Line Company* v. *State*, *supra* (Appendix C, *infra*, pp. 26-36). Consequently, the decision of the Court of Appeals conflicts with the laws of Texas on the second question presented as well as the first.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 22, 1963

PROOF OF SERVICE

The undersigned counsel for Petitioner, Trunkline Gas Company, a member of the Bar of the Supreme Court of the United States, certifies that a copy of the foregoing petition has been served upon Respondent, Hardin County, by depositing same in the United States mail, with first class postage prepaid, addressed to Messrs. Sears and Burns and Mr. Robert L. Burns, 1811 C & I Life Building, Houston 2, Texas, attorneys of record for Respondent, this 22nd day of May, 1963.

.....

Cecil N. Cook
Counsel for Petitioner

APPENDIX A

Opinion and Judgment of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19592

HARDIN COUNTY,

Appellant,

versus

TRUNKLINE GAS COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(January 9, 1963)

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges.

HUTCHESON, Circuit Judge: Alleging both a taking and a damaging under the Texas and Federal Constitutions and breach of a written contract, Trunkline Gas Company, a Delaware Corporation, Appellee, brought suit against Hardin County, a political subdivision of the State of Texas, appellant, to recover the cost of extending the casing enclosing its pipelines crossing two state highways of the State of Texas into adjoining land acquired by appellant for the State of Texas for widening the highways.

Motions for summary judgment were filed by both parties, and the district court, on full findings of fact and conclusions of law, granted the motion of appellee and denied appellant's motion.

Here citing many cases, with particular emphasis on this court's opinion in *Sinclair Pipeline Co.* v. *Archer County*, 245 F (2) 79, appellant insists that the judgment was wrong and must be reversed. We agree that this is so for the reasons hereinafter briefly stated and the authorities hereinafter cited.

Basic Texas law dictates that in the absence of a statute authorizing some other agency to contract, the authority to contract on behalf of a county is vested in the Commissioners' Court. *Anderson* v. *Wood*, 152 SW (2) 1084. The contractual authority of a Commissioner's Court is very limited and its limited nature is well stated in *Canales* v. *Laughlin*, 214 SW (2) 451, as follows:

> "The Constitution does not confer on the commissioners courts 'general authority over the county business' and such courts can exercise only such powers as the Constitution itself or the statutes have 'specifically conferred upon them'. See Mills County v. Lampasas County, 90 Tex. 603, 40 SW 403; Anderson v. Wood, 137 Tex. 201, 152 SW (2) 1084. While the commissioners courts have a broad discretion in exercising powers expressly conferred on them, nevertheless the legal basis for any action by any such court must be ultimately found in the Constitution of [sic] the statutes."

Thus, if neither the Constitution nor statutes empower a Commissioners Court to make a particular contract, the contract is null and void. *Nunn-Warren Publishing Co.* v.

Hutchinson County, 45 SW (2) 651; *Aldrich* v. *Dallas County*, 167 SW (2) 560; *Baldwin* v. *Travis County*, 83 SW 480; and *Dodson* v. *City of Del Rio*, 172 SW (2) 125.

Review of the Texas statutes relating to State highways manifests that a Texas county not only is not authorized to contract to improve, construct or reconstruct a State highway, but is expressly prohibited from expending county funds therefor. The statutes and authorities also prove that the authority of a county is limited to acquiring right-of-way for a State highway.

Prior to the creation of the Texas Highway Department, the power to acquire right-of-way for (by purchase or condemnation), and to construct, improve and reconstruct roads and highways outside of cities was vested exclusively in counties. The basic legislation creating the Texas Highway Department and defining its powers was enacted in 1917, 1923 and 1925. Acts. 1917, 35th Leg., p. 416, Ch. 190; Acts 1923, 38th Leg., p. 155, Ch. 75; Acts 1923, 38th Leg., 2nd C. S., p. 71; Acts 1925, 39th Leg., Ch. 186, p. 458. As thereafter supplemented from time to time, this legislation is found in Articles 6663 to 6674q-14 Vernon's Annotated Civil Statutes.

The Texas decisions, *Robbins* v. *Limestone County*, 268 S.W. 915 (Tex. Sup. 1925); *Nairin* v. *Bean*, 48 SW (2) 584; *Heathman* v. *Singletary*, 12 SW (2) 151; *Gabbert* v. *City of Brownwood*, 176 SW (2) 344; and *State Highway Commission* v. *Humphreys*, 58 SW (2) 144; have held uniformly that these statutes:

(1) require the Department to take over and maintain the State highways;

(2) vested exclusive control of State highways in the Highway Department;

(3) vested exclusive power to improve, construct and reconstruct State highways in the Highway Department;

(4) divested counties of the power to acquire right-of-way for State highways (until 1929); and

(5) operated to transfer the former jurisdiction of counties over State highways to the State Highway Commission.

The language of the statutes admits of no other construction.

Administration of the State Highway Department is vested in the Highway Commission, Article 6663; the Commission is charged with the duty to "formulate plans and policies for the location, construction and maintenance of a comprehensive system of state highways and public roads", Art. 6665; to establish and make public proclamation of all rules and regulations for the conduct of the work of the Department, Art. 6666; and to "investigate and determine the methods of road construction best adapted to the different sections of the state, and [to] "establish standards for the construction and maintenance of highways . . .", Article 6667.

Article 6673 authorizes the Commission

> "To take over and maintain the various state highways in Texas, and the counties through which said highways pass shall be free from any cost, expense or supervision of such highways."

This complete delegation of power over state highways to the Department and prohibition of expenditure of county funds for improvement or construction thereof is repeated in Article 6774q-4 as follows:

> "All further improvement of said State Highway System shall be made under the exclusive and

> direct control of the State Highway Department and with appropriations made by the Legislature out of the State Highway Fund. Surveys, plans and specifications and estimates for all further construction and improvements of said system shall be made, prepared and paid for by the State Highway Department. No further improvement of said system shall be made with the aid of or with any moneys furnished by the counties except the acquisition of right-of-ways which may be furnished by the counties, their subdivisions or defined road districts."

The appellee, recognizing the force and effect of the Sinclair case in this court, undertakes to distinguish it on the ground that in that case there was no agreement to pay on the part of the county, while in this case there was. In so contending, we think the appellee completely fails to appreciate the force and effect of the Texas statutes and decisions cited in and made the basis of the decision of the district court in the Sinclair case,[1] that the county was not obligated, indeed could not legally obligate itself, to pay the sum sued for.

It will be noted that the agreement on which plaintiff sued provided not that Hardin County will pay for the casing, lowering, etc., but that it will pay according to law all legal claims affixed against it, and that, for the reasons shown in the Sinclair and other cases, the claim asserted by plaintiff against the county was not, as it was not in Sinclair's case, a legal claim.

Thus the burden on plaintiff in this case is, as it was in Sinclair's case, to establish the legality of the claim and this, as in Sinclair's case, plaintiff was not able to do.

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[1] Sinclair Pipeline Co. v. Archer County, 147 F. Supp. 650; Affirmed, 245 F (2) 79.

The judgment is therefore Reversed and the cause Remanded with directions to enter judgment for the appellant.

REVERSED and REMANDED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana

APR 18 1963

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19,592

D. C. Docket No. 3851 Civil
HARDIN COUNTY,

Appellant,

versus

TRUNKLINE GAS COMPANY

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Before Hutcheson, Wisdom and Gewin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the appellant;

It is further ordered and adjudged that the appellee, Trunkline Gas Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 9, 1963

Issued as Mandate: MAR 20 1963

Recoverable Costs:

Docketing Cause, Etc. $25.00

APPENDIX B

Statutes

Vernon's Ann.Civ.Stats., Article 6673 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1900, Art. 6673), is as follows:

> "The Commission is authorized to take over and maintain the various State Highways in Texas, and the counties through which said highways pass shall be free from any cost, expense or supervision of such highways. The Commission shall use the automobile registration fees in the State Highway Fund for the maintenance of such highways, and shall divert the same to no other use unless the Commission shall be without sufficient funds from other sources to meet Federal aid to roads in Texas, and in such case the Commission is authorized by resolution to transfer a sufficient amount from such fund to match said Federal aid. Acts 1923, p. 161; Acts 2nd C.S. 1923, p. 71."

Vernon's Ann.Civ.Stats., Article 6674c-1 (Texas Acts 1947, 50th Leg., Ch. 18, p. 25), is as follows:

> "Any county or political sub-division of any county in this state, acting through its governing agency, may make, and the State Highway Commission, in its discretion, may accept, voluntary contributions of available funds from such county or political sub-division, for expenditure by the State Highway Commission in the development of the public roads of such county, or political sub-division. Acts 1947, 50th Leg., p. 25, ch. 18, § 1."

Vernon's Ann.Civ.Stat., Article 6674n (Texas Acts 1955, 54th Leg., Ch. 423, p. 1128), is as follows:

> "Whenever, in the judgment of the State Highway Commission, the use or acquisition of any land for road, right of way purposes, timber, earth, stone, gravel or

other material is necessary or convenient to any road to be constructed, reconstructed, maintained, widened, straightened or lengthened, or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway by the State Highway Commission, the same may be acquired by purchase or condemnation by the County Commissioners Court. This authority includes the power to exercise the right of eminent domain by any County Commissioners Court within the boundaries of a municipality with the prior consent of the governing body of such municipality. Provided that the county in which the State highway is located may pay for same out of the County Road and Bridge Fund, or any available county funds.

"Any Commissioners Court is hereby authorized to secure by purchase or by condemnation on behalf of the State of Texas, any new or wider right of way or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway, or land or lands for material or borrow pits, to be used in the construction, reconstruction or maintenance of State Highways and to pay for the same out of the County Road and Bridge Fund, or out of any special road funds or any available county funds. This authority includes the power to exercise the right of eminent domain by any County Commissioners Court within the boundaries of a municipality with the prior consent of the governing body of such municipality. The State Highway Commission shall be charged with the duty of furnishing to the County Commissioners Court the plats or field notes of such right of way or land and the description of such materials as may be required, after which the Commissioners Court may, and is hereby authorized to purchase or condemn the same, with title to the State of Texas, in accordance with such field notes. Provided that in the event of condemnation by the County the procedure shall be the same as that set out in Title 52, Articles 3264 to

3271, inclusive, Revised Civil Statutes of Texas, of 1925. Provided that if the County Commissioners Court of any County in which such right of way is, in the judgment of the State Highway Commission, necessary for the construction of a part of a designated State Highway shall fail or refuse to secure by purchase or by condemnation for or on behalf of the State of Texas, such right of way or part thereof, immediately and as speedily as possible, under said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925, after being served with a copy of an order of the State Highway Commission identifying by field notes, the part of the Highway necessary for the construction of such designated State Highway and requesting such County Commissioners Court to secure same, then and in such event and within ten (10) days after the service of such notice, said State Highway Commission shall direct the Attorney General of Texas, to institute condemnation proceedings in the name of the State of Texas, for the purpose of securing such right of way. Such condemnation proceedings shall be instituted by the County or District Attorney of the County in which the land is situated and the venue of such proceedings shall be in the county in which the land is situated and jurisdiction and authority to appoint three (3) disinterested freeholders of such County as Commissioners is hereby conferred upon the County Judge of such County in which the land is situated and otherwise such condemnation shall be according to the provisions of said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, 1925, as amended. Acts 1925, 39th Leg., ch. 186, p. 458, § 14; Acts 1929, 31st Leg., 32d C.S. p. 243, ch. 10; Acts 1930, 41st Leg., 5th C.S., p. 243, ch. 79; Acts 1933, 43rd Leg., p. 622, ch. 207; Acts 1935, 44th Leg., p. 485, ch. 199, § 1; Acts 1955, 54th Leg., p. 1128, ch. 423, § 1."

Vernon's Ann.Civ.Stats., Article 6674q-4 (Texas Acts 1943, 48th Leg., ch. 324, Sec. 3, p. 496), is as follows:

"All further improvements of said State Highway System shall be made under the exclusive and direct control of the State Highway Department and with appropriations made by the Legislature out of the State Highway Fund. Surveys, plans and specifications and estimates for all further construction and improvement of said system shall be made, prepared and paid for by the State Highway Department. No further improvement of said system shall be made with the aid of or with any moneys furnished by the counties except the acquisition of right-of-ways which may be furnished by the counties, their subdivisions or defined road districts. But this shall in nowise affect the carrying out of any binding contracts now existing between the State Highway Department and the Commissioners Court of any county, for such county, or for any defined road district. In the development of the System of State Highways and the maintenance thereof, the State Highway Commission shall from funds available to the State Highway Department, provide:

"(a) For the efficient maintenance of all highways comprising the State system.

"(b) For the construction, in co-operation with the Federal Government to the extent of Federal Aid to the state, of highways of durable type of the greatest public necessity.

"(c) For the construction of highways, perfecting and extending a correlated system of State Highways, independently from state funds. Acts 1932, 42nd Leg., 3rd C.S., p. 15, ch. 13, § 3, (formerly § 4), renumbered and amended Acts 1939, 46th Leg., p. 582, § 1; Acts 1941, 47th Leg., 1st C.S., p. 2, ch. 2, § 1; Acts 1943, 48th Leg., p. 494, ch. 324, § 1."

APPENDIX C

Conflicting Texas Decisions

McLennan County v. Sinclair Pipe Line Company, 323 S.W. 2d 471, 472-474 (Tex. Civ. App., Waco, 1959, error refused n.r.e.)

"This is a suit by Sinclair Pipe Line Company against McLennan County to recover from McLennan County the cost of lowering its pipeline at the request of the Commissioners Court of McLennan County in order that Farm to Market Road 1860 might be constructed across the pipeline as it lay on the W. F. Neale farm in McLennan County, Texas. The Trial Court granted judgment for Sinclair Pipe Line Company on its motion for summary judgment.

"McLennan County appeals, contending:

(1) The Trial Court erred because, under the facts, there is *no statutory duty,* contractual obligation, tort obligation, nor *other legal obligation* on McLennan County to pay Sinclair anything."[13]

• • •

"We revert to McLennan County's 1st contention. The facts are undisputed, and reflect that in 1947 Sinclair acquired a right of way easement from Neale for its pipeline to cross his farm in McLennan County, and built its pipeline on such easement. In 1954 the Texas Highway Department called on McLennan County to furnish 'the required right of way' for Farm to Market Road 1860. McLennan County, in 1956, by order of the Commissioners Court, agreed 'to furnish all required right of way free of cost to the State' for such road. Later in 1956 McLennan County notified Sinclair that the proposed road was to cross Sinclair's ease-

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[13] Emphasis has been supplied in the appendix by the writer of the Petition except where the contrary is expressly noted.

ment and pipeline as it lay on the Neale farm in McLennan County. McLennan County requested that Sinclair lower its pipeline in order that this new section of road might be constructed. Sinclair refused to lower its pipeline until McLennan County should agree to pay compensation and continued to refuse to lower the pipeline under these conditions until 27 June 1956. On that date the Commissioners Court of McLennan County passed an order stating that if Sinclair would go ahead and lower its pipeline that such action would not in any way prejudice any claim Sinclair might have in the future resulting from such lowering. Sinclair lowered its pipeline and made claim for the cost of lowering same, which claim was rejected by the Commissioners Court of McLennan County. The portion of Farm to Market Road 1860 which crossed Sinclair's pipeline was new construction and not merely improvement of an existing road.

"Sinclair based its claim for compensation for the cost of relocating its pipeline on Article I, Sec. 17 of the Texas Constitution, Vernon's Ann. St., which provides:

> 'No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person * * *.'

Sinclair's pipeline easement is property in the Constitutional sense. 12 Am. Jur. p. 787, Sec. 157. An easement is an interest in land for which the owner is entitled to compensation as much so as if the land to which the easement is appurtenant were taken. 29 C.J.S. Eminent Domain § 105, p. 910; Panhandle Eastern Pipe Line Co. v. State Highway Comm. of Kansas, 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090; Buckeye Pipe Line Co. v. Keating, 7 Cir., 229 F.2d 795; Forest Lawn Lot Owners Ass'n v. State, Tex. Civ. App., 248

S.W. 2d 793; City of LaGrange v. Pieratt, 142 Tex. 23, 175 S.W. 2d 243.

"Sinclair Pipe Line Company has a property right in its easement that it had obtained over the Neale farm. McLennan County not only requested Sinclair to lower its pipeline but pursued that request until Sinclair agreed to lower its pipe. Sinclair refused to lower its pipe until it was reimbursed, and maintained such position until it was assured by an order of the Commissioners Court that such lowering would not in any way prejudice its right to proceed with claim against the County.

"*McLennan County relies on the case of Sinclair Pipe Line Co.* v. *Archer County, D.C., 147 F. Supp. 650, affirmed 5 Cir., 245 F. 2d 79.* This was a case in which Archer County agreed to furnish the right of way for a state road project, which crossed a Sinclair pipeline. In that case Sinclair lowered its pipeline on its own volition, without even having been required or requested to do so by the County. In that case the 5th Circuit Court, in affirming a judgment for Archer County denying Sinclair compensation for lowering its pipeline, held that where the county had not condemned the pipeline easement *or requested removal of the pipeline,*[14] the company could not recover expenses incurred in relocation of lines.

"The Archer County case holds that an easement is property; that Sinclair's easement was in that case taken; and that Sinclair is entitled to reimbursement from the proper source for such expenditure. Recovery by Sinclair against Archer County was denied by reason of the fact that Archer County had not condemned the pipeline easements or requested removal of the pipeline."

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[14] Emphasis the court's.

"Here McLennan County undertook to furnish *all*[15] the right of way for the construction of Farm to Market Road 1860. This was new construction at the point in issue. Sinclair had an easement for its pipeline which the road had to cross. Such easement is property. McLennan County requested Sinclair to remove the pipeline, Sinclair refused (but later assented when McLennan County agreed that no rights would be lost by Sinclair in doing so). Sinclair's property was to all intents and purposes taken and Sinclair is entitled to compensation therefor. The Archer County case is not contrary to the foregoing but acutally supports the result herein reached. Sinclair Pipe Line Co. v. State, Tex. Civ. App. Ft. Worth, 322 S.W. 2d 58 is an analogous case and supports our conclusions herein. McLennan County's contention is overruled."

• • •

"The judgment of the Trial Court is affirmed."

Sinclair Pipe Line Company v. State, 322 S.W. 2d 58, 59-61 (Tex. Civ. App., Fort Worth, 1959).

"In 1918 appellant's easement was acquired by private grants, on which it constructed its pipe lines and had operated them for 38 years when appellee, in 1956, secured from the landowners highway rights of way easements which crossed appellant's pipe line easement at two places. The parties failed to reach an agreement as to what compensation appellant was entitled to receive; and prior to the beginning of the construction work by appellee, under an agreement that condemnation proceedings would be instituted by appellee for the purpose of determining the amount of compensation appellant should be awarded, appellant made the necessary alterations and

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[15] Emphasis the court's.

adjustments in its pipe lines to accommodate and facilitate the road construction. This work consisted of lowering, encasing, and venting the pipe lines, in conformity with a regulation promulgated by the Highway Department on May 10, 1956. It was stipulated that the reasonable cost expended by appellant in this work was the sum of $3,907.19. It was also stipulated that benefits to appellant, if any, were limited to the correction of conditions which would not have existed but for the construction and improvement of the roads over the pipe lines. Appellant sought only the cost of making the alterations in the portions of its pipe lines embraced in and under the newly acquired road rights of way.

"Appellant concedes that appellee had the right to condemn appellant's easement, but *insists that appellee has the constitutional and statutory obligation to make just compensation.* Appellee contends that denial of compensation was proper on the ground that the alterations made by appellant were required by law and by the rules and regulations of the Highway Commission and by the Highway Department; that appellee took whatever it did take, under its police power and not under its powers of eminent domain; *that appellant's expense was operational* and its denial was not in violation of the Fourteenth Amendment to the United States Constitution or Article 1, sec. 17, of the Texas Constitution, Vernon's Ann. St.; *that appellant's pipe lines were not taken or destroyed,* and appellee could not, in condemnation proceedings, require appellant to lower and adjust them; and that there was no evidence of the value of that part of appellant's easement which was condemned.

"Appellee's contentions are interesting and have been ably presented, but we are nevertheless of the opinion that this suit was brought under the condemnation statute and

is governed by the same constitutional and statutory provisions which are applicable to other condemnation suits in this State.

"That this is such a suit is shown by appellee's pleadings in the case. It sought and obtained a judgment condemning appellant's property for right of way purposes. It was stipulated that condemnation proceedings were properly before the trial court. Appellee's brief on this appeal affirms that 'This case is one wherein the State of Texas, *acting by and through the Commissioners' Court of Montague County,* Texas, under its power of eminent domain, brought suit to acquire an easement right of way over, upon and across Sinclair Pipe Line Company's pipeline easements and pipe lines * * * for the purpose of constructing and maintaining Farm to Market Roads * * *. Condemnation proceedings were filed, and on September 23, 1957, after hearing the evidence submitted by both parties, the Commissioners denied Appellant any recovery of damages by reason of the condemnation of Appellant's pipe line easements * * *. Upon the trial of the case before the County Court, without a jury, upon an agreed statement of facts, judgment was rendered granting Appellee highway rights of way easements over, upon and across Appellant's pipe line easements * * * and the Court * * * denied Appellant any damages by reason of its pipe line rights of way easements being condemned * * *.'

"The Fourteenth Amendment to the United States Constitution prevents appellee from taking property without due process of law. Article 1, sec. 17, of our State Constitution prevents appellee from taking, damaging, or destroying for or applying to public use any property without adequate compensation being made.

"Appellant's *easement* is property in the constitutional sense. 18 Am. Jur., p. 787, sec. 157. 'An easement is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured.' 29 C.J.S. Eminent Domain § 105, p. 910." • • •

"Appellee acquired rights of way easements from the owner of the fee, from whom appellant had previously acquired its easements. Appellee acquired no more rights than the owners retained when they conveyed the easements to appellant. These owners could not convey to appellee what they had already conveyed to appellant." • • •

"Arguments in analogous cases that the taking or damaging was in the exercise of police power were considered and rejected in . . . Panhandle Eastern Pipe Line Co. v. State Highway Commission (Kan.), 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090; Buckeye Pipe Line Company v. Keating, 7 Cir., 229 F. 2d 795;" • • •

"*An easement is taken* when the condemnor interferes with its owner's use. Buckeye Pipe Line Company v. Keating, supra. Appellant asks no more than the cost of the alterations to accommodate the road construction.

• • •

"In Panhandle Eastern Pipe Line Co. v. State Highway Commission (Kan.), supra, it was held that legislation requiring the pipe line company, at its own expense, to make alterations in its line to accommodate proposed highway construction, would result in taking private property without compensation, and was inhibited by the Fourteenth Amendment to the Federal Constitution."

• • •

"Having made the alterations in advance of appellee's construction work on appellee's promise to file a condemna-

tion suit in order that appellant's damages might be ascertained, we think appellant is entitled to recover its minimum damage."

• • •

"The judgment is reversed and judgment rendered for appellant."

Magnolia Pipe Line Company v. City of Tyler, 348 S.W. 2d 537, 539, 540-541, 543 (Tex. Civ. App., Texarkana, 1961, error refused).

"Magnolia in the trial court contended among other things that its easement rights were superior to the reserved rights of the grantors, that the acts of the City in uncovering the pipe line on one street and attempting to pave very near to the line on another street, and *taking a portion of its pipe line right-of-way, thereby interfering with its enjoyment of its easement* privileges by the construction of new street paving, would constitute a taking of Magnolia's property without due process of law, and would violate its constitutional rights under both the Texas and Federal constitutions. It was Magnolia's contention therefore that the City was due to pay to Magnolia the agreed reasonable costs for lowering and encasing the pipe line. Magnolia further denied the claims of the City that it was acting in the proper exercise of its police power."

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"The trial court found in its findings of fact that it was necessary to lower and encase the pipe line at both streets, and further found to the effect that unless Magnolia's pipe line was lowered and encased that same would be the cause of serious danger to the public and held to the effect that Magnolia's use thereof was subject to reasonable regulation by the City, and that it was a valid exercise of the police power by the City to cause Magnolia to lower and encase

its high pressure pipe oil line where crossed by the city streets in question, at Magnolia's cost and expense, in order to meet the needs of the public for safe travel and transportation. The trial court rendered judgment against Magnolia on its cross-action to recover from the City the amount of the costs agreed upon as reasonable, and being the sum of $3,630.98. Magnolia has appealed."

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"Art. 1, Sec. 17, of our State Constitution, Vernon's Ann. St., prevents the taking, damaging, or destroying for or applying to public use any property without adequate compensation being made, unless consented to by the owner of such property. Also the Fourteenth Amendment to the United States Constitution prevent the taking of a person's property without due process of law.

"Magnolia's pipe line *easement* is property in the constitutional sense 12 Am. Jur. p. 787, Sec. 157.

"An easement is an interest in land for which the owner is entitled to compensation as much so as if the land to which the easement is appurtenant were taken. 29 C.J.C. Eminent Domain § 105, p. 910; McLennan County v. Sinclair Pipe Line Company, Tex. Civ. App., 323 S.W. 2d 471, wr. ref., n.r.e.; Panhandle Eastern Pipe Line Co. v. State Highway Comm. of Kansas, 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090; Buckeye Pipe Line Co. v. Keating, 7 Cir., 229 F. 2d 795;" • • •

"Magnolia had a property right in its two easements it had obtained from Nichols and Thedford. The City of Tyler requested and demanded that Magnolia lower and encase its pipe line. Magnolia refused to lower and encase the pipe line at its own cost and expense, and maintained such position until the written agreement was entered into heretofore referred to, wherein it was clearly set forth that

the lowering and encasing of such pipe lines under the streets in question would not in any way prejudice Magnolia's right to seek reimbursement for the costs thereof from the City. Thus it is clear that Magnolia was not a 'volunteer' in lowering and encasing its pipe line at the streets in question.

"In McLennan County v. Sinclair Pipe Line Company, surpa, Tex. Civ. App., 323 S.W. 2d 471, 474, wr. ref., n.r.e., a somewhat analogous case to the case at bar, Sinclair (who protested and was not a volunteer) was allowed to recover from McLennan County the expense of lowering and encasing its pipe line at points where a *new*[16] road was placed over it by McLennan County. We quote briefly from the Court's opinion in said case as follows:

> 'Here McLennan County undertook to furnish all the right of way for the construction of Farm to Market Road 1860. This was new construction at the point in issue. Sinclair had an easement for its pipeline which the road had to cross. Such easement is property. McLennan County requested Sinclair to remove the pipeline, Sinclair refused (but later assented when McLennan County agreed that no right would be lost by Sinclair in doing so). Sinclair's property was to all intents and purposes taken and Sinclair is entitled to compensation therefor. The Archer County case is not contrary to the foregoing but actually supports the result herein reached. Sinclair Pipe Line Co. v. State., Tex. Civ. App., Ft. Worth, 322 S.W. 2d 58 is an analogous case and supports our conclusions herein. McLennan County's list contention is overruled.'

"Sinclair Pipe Line Company v. State of Texas, Tex. Civ. App., 322 S.W. 2d 58, 60, no writ history, is also a somewhat analogous case to the case at bar, and holds

[16] Emphasis the court's.

that where the State of Texas acquired highway rights from owners of the fee crossing over and invading easements which such owners had previously granted to Sinclair Pipe Line Company for a private pipe line, that the State invaded the pipe line company's easement by requiring it to change locations of pipes in connection with construction and improvement of roads, and such taking or damaging was not in the valid exercise of the police power, and that the pipe line company was entitled to receive as a minimum the cost of alterations and adjustments made in the pipe lines to accommodate and facilitate the road construction." • • •

"While undoubtedly the police power of a city is vast, as outlined by the cases cited by appellee in its excellent brief, it is also clear that such power must be *validly exercised*.[17] Since the *pipe line easements* were never dangerous to the public until the same were invaded by the City, and the dangerous conditions were proximately caused by the invasion of such easements by the City, we hold that the City under such circumstances *could not* in the guise of its police power *take or damage Magnolia's easements* without paying Magnolia adequate compensation therefor under Art. 1, Sec. 17, of our State Constitution, and under the Fourteenth Amendment of the United States Constitution.

"Appellant's points are sustained. The judgment of the trial court is reversed and judgment is here rendered for Appellant Magnolia for the sum of $3,630.98 against appellee City of Tyler.

"Reversed and rendered."

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[17] Emphasis the court's.

APPENDIX D

Conflicting Opinions of the Attorney General of Texas

[SEAL]

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

WILL WILSON
Attorney General

July 12, 1961

Miss Edna Cisneros
County Attorney
Willacy County
Raymondville, Texas

Opinion No. WW-1090
Re: Whether the Commissioner's Court, without paying compensation therefor, can require a gas pipeline company to encase in metal and vent its pipeline under the facts stated.

Dear Miss Cisneros:

You have requested the opinion of this office on the following question:

> "May the Commissioner's Court, without paying compensation therefor, require a gas pipeline company to incase in metal and vent its pipeline under and across a road which is to be paved, not only across the right-of-way of such road in existence at the time such pipeline was laid, but in addition, to incase in metal and vent such pipeline lying across and under the contiguous right-of-way thereafter acquired by the County for the purpose of widening such road?"

As we understand your question and the factual situation which prompted its submission, the pipeline in question, at the time it was laid, crossed beneath an existing roadway which is under the jurisdiction of the Commissioner's Court

of Willacy County and sometime thereafter the Commissioner's Court acquired additional right-of-way for the purpose of widening and improving the existing roadway. The contemplated improvement of the roadway requires that the pipeline be enclosed in metal casing and vented.

The situation raised by the facts presented requires that we consider the pipeline that must be encased and vented in two distinct categories, to wit: (1) that portion under the existing roadway and (2) that portion under the additional right-of-way which was acquired after the pipeline was in place.

Having placed its transmission lines under the existing roadway subsequent to the effective date of Article 1436b of Vernon's Civil Statutes, the pipeline company in question is subject to the provisions and requirements of this Article, which provides in part as follows:

> "... The public agency having jurisdiction or control of a highway or county road, that is, the Highway Commission or the Commissioners Court, as the case may be, may require any such person, firm or corporation or incorporated city or town at its own expense to relocate its pipes, mains, conductors or other fixtures for conducting gas on a state highway or county road outside the limits of an incorporated city or incorporated town so as to permit the widening or changing of traffic lanes, by giving thirty (30) days written notice to such person, firm or corporation or incorporated city or town and specifying the facility or facilities to be moved and indicating the place on the new right-of-way where such facility or facilities may be placed. Such person, firm or corporation or incorporated city or town shall replace the grade and surface of such road or highway at its own expense."

Consequently, it is our opinion that the portion of the pipeline which passes under the roadway as it existed prior to the acquisition of the additional right-of-way is governed

by our holding in WW-961 (November 18, 1960) and the language therein quoted from *State* v. *City of Austin,* ..... Tex. ....., 331 S.W. 2d 737 (1960) and you are hereby advised that the pipeline company can be required to encase and vent this portion of its pipeline at its own expense and without compensation from the county.

The remaining portion of the pipeline affected by the planned improvement and widening program, i.e., that portion passing under the additional right-of-way acquired by the county in order to effectuate the widening and improvement of the roadway, presents a different question.

As your request indicates, the pipeline company had acquired an easement for its pipeline under the property adjacent to the existing roadway prior to the time such property was acquired by the county as part of the right-of-way.

Section 17 of Article I of the Constitution of the State of Texas provides that:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; . . ."

Since the existing easement of the pipeline company was not condemned or otherwise acquired by the county at the time the additional right-of-way in which it now lies was acquired, any requirement that this portion of the pipeline be encased and vented would be a taking of the pipeline company's easement and is prohibited by Section 17 of Article I of the Constitution of the State of Texas unless adequate compensation is paid to the pipeline company. See WW-125 (May 22, 1957) and WW-1004 (March 6, 1961).

Therefore, you are advised, that in our opinion the pipeline company in question cannot be required to encase and

vent that portion of its pipeline which lies within a prior easement under the property acquired by the county for roadway improvement and widening purposes without compensating the pipeline company therefor.

SUMMARY

The Commissioner's Court is authorized to require a pipeline company to encase and vent that portion of its pipeline which crosses under an existing roadway at the pipeline company's own expense and without reimbursement, but the Commissioner's Court cannot require the pipeline company to encase and vent that portion of its pipeline which lies in a pre-existing easement under property acquired for the improvement of such roadway without compensating the pipeline company therefor.

Yours very truly,

WILL WILSON
Attorney General of Texas

By /s/ W. O. Shultz
W. O. Shultz
Assistant

WOS:mm

APPROVED:

OPINION COMMITTEE
W. V. Geppert, Chairman

John Reeves
John Leonarz
Linward Shivers
Marvin F. Sentell

REVIEWED FOR THE ATTORNEY GENERAL

BY: Morgan Nesbitt

[SEAL]

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

WILL WILSON
Attorney General

March 6, 1961

Mr. Ellis A. Oualline, Jr.
County Attorney of Montgomery County
Conroe, Texas

Opinion No. WW-1004

Re: Whether Commissioners' Court may require gas pipe line company to move or lower its pipe lines which are now in, along, or across a new right of way location to be purchased for a prospective farm-to-market road.

Dear Mr. Oualline:

Your request for an opinion is in the following language:

"The Commissioner's Court of Montgomery County has requested information that goes beyond your opinion No. WW-961. They are purchasing right-of-way on which the State of Texas will construct a farm-to-market road.

"May the Commissioner's Court of Montgomery County require gas pipe line companies to move or lower their pipe lines along or across this right-of-way for the proposed road without paying them compensation therefor?"

Our holding in Opinion No. WW-961, to which you refer, is reflected in the "Summary" thereof, which we quote:

> "The Commissioners' Court of Sherman County, Texas, is authorized to require gas pipeline companies, whose lines run along or across public roads which are to be paved, to move or lower such pipelines at their own expense and without reimbursement from the State."

That opinion pertains to a pipe line which has been laid in an existing street. Our conclusions were based upon *State* v. *City of Austin*, ... Tex. ..., 331 S.W. 2d 737 (1960), which in turn is predicated upon Section 1 of Article 1436b, V.C.S. We quote the applicable portions of that statute:

> "Section 1. Any person, firm or corporation or incorporated city or town engaged in the business of transporting or distributing gas for public consumption shall have the power to lay and maintain pipes, mains, conductors and other facilities used for conducting gas through, under, along, across and over all public highways, public roads, public streets and alleys, and public waters within this State; provided that within the corporate limits of an incorporated city or incorporated town such right shall be dependent upon the consent and subject to the direction of its governing body.... *The public agency having jurisdiction or control of a highway or county road, that is, the Highway Commission or the Commissioners Court, as the case may be, may require any such person, firm or corporation or incorporated city or town at its own expense to relocated its pipes, mains, conductors or other fixtures for conducting gas on a state highway or county road outside the limits of an incorporated city or incorporated town so as to permit the widening or changing of traffic lines. . . .*" (Emphasis Added)

It is thus seen that pipe line companies may lay their pipe lines in existing highways, roads, streets, etc., but, in

turn, may be required by the governing authority to relocate them so as to permit the widening or changing of traffic lanes.

A different situation exists in your case. Your letter to the Attorney General dated February 4, 1961, supplementing information in your opinion request, makes it plain that the proposed farm-to-market road is on new location and that the pipe line in question is on private property. This being true, there is no statute or law by which the pipe line company can be required to move or lower its pipe lines. Doubtless this pipe line lies within an easement secured by the company from the owner of the land.

Section 17 of Article I of the Constitution of Texas states:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."

If by negotiation your Commissioners' Court cannot persuade the company to move this pipe line you will have to pay it therefor. If a price cannot be agreed upon you will have to condemn the easement, of which the pipe line is a part. If the Commissioners' Court cannot agree with the owner of the fee on the value of the land then a condemnation suit should be brought jointly naming both the fee owner and the pipe line company as condemnees.

In answer to your question, therefore, it is our opinion, and we so hold, that the Commissioners' Court of Montgomery County may not require a pipe line company to move or lower its pipe lines from the private premises upon which a future road is contemplated.

SUMMARY

The Commissioners' Court may not require a gas pipe line company to move or lower its pipe lines which are now in, along, or across a new right of way location being acquired for a proposed farm-to-market road.

Yours very truly,

WILL WILSON
Attorney General of Texas

By /s/ W. Ray Scruggs
W. Ray Scruggs
Assistant

WRS:vj

APPROVED:

OPINION COMMITTEE
W. V. Geppert, Chairman

Jerry Roberts
Riley Eugene Fletcher
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REVIEWED FOR THE ATTORNEY GENERAL
By: Morgan Nesbitt

[SEAL]

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

WILL WILSON
Attorney General

May 22, 1957

Honorable Fred F. Holub
County Attorney
Matagorda County
Bay City, Texas

Opinion No. WW-125

Re: Authority of County to reimburse Pipe Line Company for expenses incurred by virtue of acquiring right of way where there is a preexisting pipe line.

Dear Sir:

The following question was presented in your recent letter:

> "The question that is presented here is that when the State Highway Commission takes over an existing County Road for the purpose of constructing a F.M. Highway and requests additional rights of way to be purchased by the County for a wider right of way than originally included in the County road right of way, and said old County road is crossed by a pipe line of a common carrier, must the County pay said common carrier for meeting State specifications in lowering and additional casing of the pipe line under the widened portion of said right of way?"

In your letter you also offered the following comment:

> "It would appear, taking into consideration Article 6022 and 2351 that although the common carrier would have the right to cross a public road, where same is a County road under Article 2351, the Commissioners Court in its exercise of general control could control the method of crossing and the location of crossing. Here in this case, had the common carrier made a formal notice of crossing, the Commissioners Court, could, it would be reasonable to assume, foresee a future widening of said road and require the crossing to provide for future widening. As it appears that no formal approval or notice of crossing was procured by the common carrier, it would appear that now any additional casing or lowering should be done at the expense of the common carrier."

We refer you to Opinions WW-45 and WW-78 (which are enclosed) holding, in effect, that the expenses for relocation of a utility on right of way already subject to public use, must be borne by the utility rather than the public. However, your question as presented was limited to the proposition of whether or not reimbursement was required to be paid to the pipe line common carrier for meeting State specifications in lowering and additional casing of the pipe line under the new or additional right of way required for the widening program. Attorney General Opinion No. 0-2405A, dated October 9, 1940, which you mentioned you had in your files, states as to the measure of damage in a similar case:

> "Therefore, we are of the opinion that where the state has permitted such corporation as above mentioned to erect and construct its lines under and across public roads, and where the county requires the additional right of way for new highways or public roads over and across the private property of the above mentioned

> corporation, the county would be liable to said corporation *for the expense of casing said lines and burying them at a proper depth . . .*" (Emphasis added).

In *City of Denton* v. *Chastain,* Civ. App. 1941, NWH, 156 S.W. 2d 554, the court held:

> "It has long been the rule in this state that if by the taking of a portion of one's land for public use it becomes necessary to build fences, construct gates, culverts and other things necessary to make the remainder usable and to prevent greater losses sustained by the appropriation of that part taken, evidence of such expenses thus incurred should be considered by the jury in fixing the amount of damages to that part not appropriated. . . ."

Also, see *Pillot* v. *City of Houston,* Civ. App., 1932, NWH, 51 S.W. 2d 794.

Should this right of way have to be condemned, the cost of burying and providing additional casing would not be a separate issue, but should be considered in the general issues of the before and after values of condemnee's property. If, however, this right is acquired by out of court settlement, it seems that there would be no other way to compute what the pipe line company is entitled to but by considering the cost of reburying and providing additional casing, and it is considered that this is supported by ample authority as above set forth.

You pointed out, as above quoted, that you considered this situation different because the pipe line utility had not secured permission of the Commissioners' Court to cross the existing road and that "it would be reasonable to assume" that the Commissioners' Court would "foresee a future widening of said roads and require the crossing to provide

for future widening . . ." and for that reason there should be no liability for reburying and providing additional casing on the portion taken for new or additional right of way.

It is submitted that this proposition has been decided adversely to your contention in *Hammond* v. *Wichita County*, Civ. App., 1956, 290 S.W. 2d 545 (no writ history):

> "Wichita County has no right to destroy appellant's property prior to the lawful appropriation thereof by paying or securing the payment of compensation. City of Fort Worth v. Dietert, Tex. Civ. App., 271 S.W. 2d 299, error refused.
>
> "Conversely, the County has no right to restrain appellant from making lawful use of his property prior to a legal taking thereof by the County."

Hence, assuming, without deciding, that the statutes impose upon the pipe line common carrier the duty of clearing with the Commissioners' Court before crossing a county road, and even assuming that the Commissioners' Court has foreseen the widening, it could not have required the pipe line common carrier to make special preparations, at additional expense, on land not in the then existing right of way as such would have been a restraint upon the use of private property prior to a legal taking thereof.

SUMMARY

Where a pipe line crosses under an existing county road, which road is desired by the State as a Farm to Market road, and additional right of way is required to widen the road, the governmental authority securing this additional right of way is authorized to pay the pipe line common carrier for expenses incurred in meeting state specifications which specifications require the lowering of the pipe line and additional casing

therefore under the widened, or newly acquired, right of way.

Yours very truly,

WILL WILSON
Attorney General of Texas

By /s/ Joe G. Rollins
Joe G. Rollins
Assistant

APPROVED:

OPINION COMMITTEE
H. Grady Chandler, Chairman

Fred Werkenthin
Ralph R. Rash
Jas. W. Wilson

REVIEWED FOR THE ATTORNEY GENERAL BY:

Geo. P. Blackburn

THE ATTORNEY GENERAL OF TEXAS

Austin 11, Texas

This opinion overrules
Opinion No. O-2405

Gerald C. Mann

Hon Fred Norris
County Auditor
Polk County
Livingston, Texas

Opinion No. O-2405-A
Reconsideration of Opinion
No. O-2405
Re: Highways — Pipe Lines

Dear Sir:

In your original request for an opinion of this Department upon the matters therein discussed you attached a copy of a franchise that Polk County granted to the Shell Pipe Line Corporation in 1931. Pursuant thereto, the Shell Pipe Line Corporation laid pipe lines and erected telephone lines under, above, across, etc. the public roads of Polk County. Then in 1938 Polk County was called upon by the State Highway Department to secure right-of-way for various highway constructions, most of which was newly located along the old highway, consequently, the Shell Pipe Line Corporation was called upon to lower its pipe line in several places and to case the pipes at these new locations. Some of these new locations were only a few yards from the old locations, but the above mentioned work was necessary.

About December, 1928, said corporation presented Polk County with an account representing the cost necessitated

by the above mentioned work. The commissioners' court passed an order that the same be paid, but the auditor refused to sign the warrant, and to date the corporation has not received any compensation, but now demands that the account be paid. The present commissioners' court at a recent meeting rescinded the former order of said court passed by their predecessors ordering that the account be paid. Under the above mentioned facts your original inquiry presented the following question:

> "Please advise, as to your opinion, as to whether Polk County owes Shell Pipe Line Corporation anything or not."

And in answer to the above in our original Opinion No. O-2405, it was held in effect that the commissioners' court or Polk County had no authority to pay the claim.

Under the facts stated in the original request it was assumed that the above mentioned corporation was constructing and running its pipe lines under existing public roads. However, under the actual facts presented to this Department the said corporation had right-of-way deeds for all the pipe line laid in Polk County and the new highways crossed the right-of-way of the said corporation at several different places, due to the construction of the new highways, the corporation was forced to lower and case its lines in compliance with the State regulations and law, and at no point along the pipe line did the new highway use the old highway right-of-way.

It is a fundamental principle of law that private property shall not be taken for public use without adequate compensation, and that no person shall be deprived of his property except by due course of law. Therefore, we are of the opinion that where the state has permitted such corporation as above mentioned to erect and construct its lines under

and across public roads, and where the county requires the additional right-of-way for new highway or public roads over and across the private property of the above mentioned corporation, the county would be liable to said corporation for the expense of casing said lines and burying them at a proper depth. We think that our Opinion No. 0-2274, and the authorities cited therein, is applicable to the question here under consideration and enclose a copy of the same for your convenience. Our original Opinion No. 0-2405 is hereby withdrawn.

Trusting that the foregoing fully answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By /s/ Ardell Williams
Ardell Williams, Assistant

APPROVED OCT 9, 1940

/s/ Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

AW:BBB:wb

APPROVED: OPINION COMMITTEE
BY BWB Chairman

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 153

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1125

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

To the Honorable Supreme Court of the United States:

Respondent, HARDIN COUNTY, presents this Brief in Opposition to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause January 9, 1963.

QUESTIONS PRESENTED

1. Whether, under the statutes of Texas granting exclusive control of, and imposing the exclusive duty to improve

and maintain, State Highways on the Texas Highway Department, and prohibiting expenditure of funds of Texas counties for State Highways for any purpose other than acquisition of right-of-way, a Texas county authorizing a utility, which has refused to comply with the request of the Texas Highway Department to encase its gas pipeline in right-of-way acquired to widen an existing State Highway, to make such encasement at the expense of the county, has contracted to acquire right-of-way, or to construct and improve the highway.

2. Whether an order of a Texas county that it will pay "according to law all legal claims affixed against it, for the casing . . . of all pipelines in existing and proposed . . . highway rights-of-way, when not otherwise compensated" is an offer to contract to pay a utility the expense of encasing its gas pipeline in right-of-way acquired to widen an existing State Highway.

3. Whether, under the statutes of Texas, assuming that the agreement of a Texas county to pay a utility the cost of encasing its gas pipeline in right-of-way acquired to widen an existing State Highway is one to acquire right-of-way, such county has the power to make such contract in the absence of evidence of (a) a determination by the State Highway Commission to improve and widen such State Highway, (b) a contract between the county and the State Highway Commission obligating the county to acquire right-of-way to widen such highway, (c) a request from the State Highway Commission to the county to acquire right-of-way from such utility, and (d) the State Highway Commission performing its duty of furnishing to the county plats or field notes of the easement of such utility.

4. Whether, under the Constitution and statutes of Texas, a utility which has exercised the privilege (granted by statute and permit of the Texas Highway Department) of

placing its gas pipeline across a State Highway, has a legal duty to comply with the request of the State of Texas, acting through the Texas Highway Department, to encase its pipeline in right-of-way acquired to widen such highway.

5. Whether a request by the Texas Highway Department to a utility which has exercised the privilege (granted by statute and permit of the Texas Highway Department) to place its gas pipeline across a State Highway, to encase its pipeline in right-of-way acquired to widen such highway, is a valid exercise of the police power of the State of Texas.

STATUTES INVOLVED

The pertinent statutes are Vernon's Annotated Civil Statutes, Articles 6673, 6674n and 6674q-4, set out in Appendix B to the Petition, and Articles 1436, 1497, 1436b, 6021, 6320, 6327, 6663, 6665, 6666, 6667, 6674a, set out in Appendix A, infra, pp. 32-39.

COUNTERSTATEMENT OF THE CASE

A counterstatement is necessary to correct inaccuracies in Petitioner's statement.

To prevent definite hazards to vehicular and other traffic, the highway and the pipeline, since 1949, by maintenance manuals and administrative order, the Texas Highway Department (Department) has required pipelines carrying gas across a State Highway to be encased for the full width of the right-of-way and vented at each end (R. 28-35). The packed nature of the soil under, and the pressure and weight of vehicular traffic on, a roadway causes unusual stresses on an unencased gas pipeline which may result in damage to the pipeline, cave-ins of the roadway, escaping gas subject to explosion and other hazards, and extensive corrosion by electrolysis.

Encasement provides protection to the gas pipeline from the compact soil, weight and pressure of vehicular traffic, and electrolysis; prevents leaks, escaping gas and other hazards; provides a passage for the escape of the gas to the vents at the right-of-way line; and eliminates traffic hazards resulting from escaping gas, and cave-ins in the roadway by permitting repair of the pipeline without obstructing traffic by cutting the pavement (R. 28, 29, 27, 115, 116).

In 1950, the Department issued written permits authorizing Petitioner to install a gas pipeline across U. S. Highway 69 and F.M. (Farm-to-Market) Highway 418 in Hardin County, on the condition, among others, that the pipe be placed through a hole bored beneath the highway in an iron casing extending from right-of-way line to right-of-way line, and sealed and vented at the ends (R. 186, 188, 189). Petitioner constructed its line, encased and vented, across each highway (R. 14, 19) and, in 1951, acquired pipeline easements from the owners of the lands abutting the crossings (R. 233-235).

Thereafter, Respondent undertook to acquire right-of-way to widen each highway, but Petitioner inaccurately states that the Department determined to widen said highways. There is no evidence of an order of the State Highway Commission directing the widening of either highway.

In 1955, Respondent contracted with the Department to acquire right-of-way for, fence, and remove all obstructions on F.M. Highway 418 (R. 204, 205). There is no evidence of Respondent contracting to acquire right-of-way for U.S. Highway 69. Except as authorized by contract, the Department could not and did not require Respondent to acquire any right-of-way.

The Department furnished Respondent plats, field notes and right-of-way deeds (naming the grantors) for each par-

cel of land the Department requested Respondent to acquire (R. 66, 189, 196), but did not furnish Respondent a plat, field notes or a right-of-way deed of Petitioner's easements abutting either highway and did not request Respondent to purchase or condemn Petitioner's easements (R. 66). Pursuant to the request (plat, field notes, and deeds) of the Department, Respondent acquired from the various owners all right-of-way necessary for the widenings, including the parcels of land owned by the grantors of Petitioner's easements (R. 66). As Petitioner admits, however, "Respondent made no effort in either instance to purchase or condemn Petitioner's private easements or any right or interest therein" (Petition p. 4). Petitioner is still using its easements, its pipelines were not removed, and neither Respondent nor the State of Texas acquired any interest from Petitioner.

While Respondent was acquiring right-of-way for widening of the highways, the Department, on several occasions, requested Petitioner to encase and vent its pipelines in the right-of-way acquired to widen the existing highways (not new highways) in accordance with the permit under which they were installed (R. 67, 194, 214). Petitioner repeatedly refused to comply with the request unless assured of reimbursement for its actual cost (R. 15, 20, 197, 219).

The sole basis of Petitioner's statement that the Department considered an uncased pipeline an obstruction is the testimony of local engineers that, from an engineering point of view, anything in the way of construction or maintenance was an obstruction, and that such conclusion was simply an engineer's attempt to interpret Respondent's contract (R. 86, 104, 115). Similarly, there is no basis for Petitioner's statement that Department officials considered that Respondent had the responsibility to compensate for casing its pipeline. Local engineers attempted to so inter-

pret Respondent's contract, but admitted that they would not state Respondent owed Petitioner reimbursement, but only that reimbursement would not come from the State (R. 83-87, 101-105, 115, 125-127).

The "officials" did not refer the matter of compensation to Respondent. A local engineer wrote Petitioner that, as to the question of reimbursement, the State could not help, as "the clearing of right-of-way is a matter handled by the County" (R. 199), and local engineers refused to testify that they had even referred Petitioner to Respondent. (R. 117-118, 126-127). After Petitioner's repeated refusals, Respondent's County Judge entreated Petitioner to comply with the Department's request. (R. 200, 227). Petitioner replied that it realized that Respondent was "not responsible for the specification that the highway in question be cased", but that it would not commence casing until informed it would be reimbursed (R. 202-204). Respondent then passed an order stating that Petitioner "is authorized to extend the casing of their pipelines across U. S. Highway 69 at county expense" (R. 149).

The County Judge advised Petitioner that it was the County's contention that payment for extended casing on F.M. Highway 418 would be illegal and, following Petitioner's reply arguing that Respondent had authority to pay for the casing (R. 226-227), Respondent passed an order that it would pay "according to law all legal claims affixed against it, for the casing" of pipelines across State Highways (R. 228).

Following each order, Petitioner encased its pipelines as requested by the Department (R. 205-207, 227-230). Respondent refused to reimburse Petitioner and Petitioner filed this suit. Motions for Summary Judgment were filed by both parties, and the District Court, filing findings of fact and conclusions of law (R. 64-71), granted the motion

of Petitioner and denied Respondent's. The Court of Appeals reversed the District Court judgment and remanded the cause, with directions that judgment be entered for Respondent.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS IS CORRECT

After extensive review of Texas statutes and decisions delineating the respective duties and powers of the Texas Highway Department and counties as to State highways, and defining the limited power of Texas counties, the Court of Appeals concluded that Respondent did not have power to pay Petitioner to case its line because (1) the Texas Highway Department has exclusive control of and power and duty to construct and maintain State highways, (2) no funds of a Texas county can be expended for the construction or improvement of a State highway, (3) county funds may be expended only for the purpose of acquiring right-of-way, and (4) the extension of casing on a pipeline is not incidental to acquisition of right-of-way but to construction.

These holdings are not, as Petitioner asserts, based solely on a construction of Vernon's Ann. Civ. Stats. Articles 6674n and 6674q-4, and *Sinclair Pipe Line Co.* v. *Archer County*, 147 F. Supp. 650 (N.D. Tex., 1956), affirmed 245 F. 2d 79 (5th Circuit, 1957). As evidenced by the opinion, the holding rests upon a review of Texas cases defining the limited power of a county; review of the basic legislation creating the Texas Highway Department and defining its powers; review of all statutes (not merely those cited by Petitioner) relating to State highways; analysis of Texas decisions construing such basic legislation and supple-

mentary statutes; the *Archer County* case and "the force and effect of the Texas statutes and decisions cited in and made the basis" of such case; and other authorities cited in Respondent's brief below.

Under the express language of Vernon's Ann. Civ. Stats., Articles 6673, 6674n and 6674q-4, all *improvement and construction* of State Highways must be paid out of the State Highway fund, and the counties of Texas are *prohibited from paying any money except for the acquisition of right-of-way.* Thus, the question of Respondent's power may be determined by defining acquisition of right-of-way and improvement or construction of a State Highway. Vernon's Ann. Civ. Stats., Article 6674a, prescribes the answer that

> "The term 'improvement' shall include construction, reconstruction or maintenance, or partial construction, reconstruction or maintenance and the making of all necessary plans and surveys preliminary thereto."

Although no State decision construing the statutes involved or deciding the precise issue in question was cited to the court below, in addition to *Archer County* and the cases cited therein, in determining that the agreement to pay Petitioner to case its pipeline was not incidental to acquisition of right-of-way, but to construction and improvement of the highway, the court considered the decision of the highest court of the State in *State* v. *City of Austin*, 331 S. W. 2d 737 (Tex. Sup. 1960). The State contended that Vernon's Ann. Civ. Stats., Article 6674-w-4, under which various utilities sought reimbursement for relocation of facilities necessitated by improvement of an interstate highway, violated Tex. Const., Article VIII, Section 7a,[1] in that

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[1] This provision prescribes that certain funds "shall be used for the sole purpose of acquiring rights-of-way, constructing, maintaining and policing "public roadways.

the cost of relocation of the utility was not part of the cost of "constructing" a highway.

With the point squarely presented "that utility relocation expense is not part of the cost of highway construction", the court reviewed decisions from other states denying such contention, and concluded:

> "It seems to us that the latter conclusion is sound in principle and supported by the better reasoning. Article VIII, Section 7-a, does not define or restrict the meaning of 'constructing' in any way. The term obviously does not embrace merely the clearing and grading of the roadbed and the pouring of concrete, but includes 'everything appropriately connected with, and necessarily incidental to, the complete accomplishment' of the general purpose for which the fund exists."
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> • • •
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> "The relocation of such facilities is made necessary by and is an integral part of the highway improvement program. If the Legislature determines, as it has in this instance, that the non-betterment cost thereof should be paid by the state, it is our opinion that the same is properly attributable to highway construction within the meaning of the Constitution."

Understandably, Petitioner does not cite *City of Austin* or any other decision of the Texas Supreme Court.

Petitioner did not seek to recover the market value of its easements, but only sought to recover the cost of encasement. In determining that an agreement to pay the expenses of casing a pipeline is incidental to construction and improvement, and not acquisition of right-of-way, the court below considered the well settled law of Texas that the measure of damages for a taking is the market value of the property taken and not cost of adjustment. *Chicago R.I. & G. R.R. Co.* v. *Tarrant County Water Control & Improve-*

ment District, 73 S.W. 2d 55 (Tex. Sup. 1934); *Gulf C. & S.F. Ry. Co.* v. *Milam County*, 38 S.W. 747 (Tex. Sup. 1897); *Houston & T.C. Ry. Co.* v. *City of Houston*, 41 S.W. 2d 352 (Tex. Civ. App. 1931). Respondent made no effort to purchase or condemn Petitioner's easement.

Petitioner infers that Respondent is liable, under its agreement with the Department, to "remove all obstructions". Petitioner's pipeline was not even lowered, much less removed — merely encased. Moreover, inasmuch as the power of Respondent is limited to acquiring right-of-way, it is powerless to contract to remove any obstruction except those removed as an incident of acquiring right-of-way. Respondent acquired no right-of-way from Petitioner.

Petitioner urges here, as it did for the first time in the Petition for Rehearing below, that Vernon's Ann. Civ. Stat., Article 6674c-1, authorizes a Texas county to make voluntary contributions to the Department for the development of highways in such county. The statute does not authorize a contribution for the development of *State Highways*, but for "public roads of such county". Under Vernon's Ann. Civ. Stats., Chap. 2, Title 116, Texas counties still establish and maintain county roads which are not a part of the State Highway System. Vernon's Ann. Civ. Stat. 6667 authorizes the Department to render assistance to counties with reference to their public roads, and Article 6674-c-1, was enacted to provide a means for counties to contribute funds to the State Highway Department to be used in the development of *county roads* — not State highways.

Clark v. *Greer*, 232 S.W. 2d 876 (Tex. Civ. App. 1950), approves a conveyance by a *city* to the Highway Commission, but, contrary to Petitioner's claim, expressly notes that "The question of the city's right of eminent domain to condemn a right-of-way for the purposes [State high-

way] here involved is not before us and we do not pass upon the same." *Clark* unnecessarily and erroneously cites the statute because its application is limited to "any county or political subdivision of any county in this State". A Texas city is a political subdivision of the State — not of a county. *Supreme Forest Woodmen's Circle* v. *City of Belton*, 100 F. 2d 655 (CCA 5, 1938); *Ex Parte Ernest*, 136 S.W. 2d 595 (Tex. Crim. App. 1940); *Cofield* v. *Britton*, 109 S.W. 493 (Tex. Civ. App. 1908, error dism.).

Vernon's Ann. Civ. Stats., Articles 6673, 6674n, and 6674q-4, are consistent in the limitation that no county funds may be expended on a State highway except for acquisition of right-of-way. Being consistent, there is no question of implied repeal.

Under the statutes and decisions before the court below, the convincing evidence was that the Texas Supreme Court would hold in accordance with the judgment under attack.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH APPLICABLE STATE LAW

A. Principles Controlling Review of Court of Appeals Decision

The petition fails to show that the Court of Appeals "decided an important state . . . question in a way in conflict with the applicable state . . . law . . ." Rule 19, Supreme Court Rules.

Under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), in deciding a state question, Federal courts must follow the "law of the state" as declared by its Legislature, or by its highest court, or in some instances by an intermediate court. Petitioner cites no statute or decision of a

Texas court which conflicts with the decision of the court below. To conflict with a decision of a court of appeals, the state decision must be upon "the precise issue of state law involved", *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); a "pronouncement which directly controls [the] question," *General Box Co.* v. *United States*, 351 U.S. 159 (1956); a "case on the precise statute" before the Court of Appeals, *Propper* v. *Clark*, 337 U.S. 472 (1949); a case "construing the relevant" state law, *MacGregor* v. *State Mutual Life Ass. Co.*, 315 U.S. 280 (1942); or a case determining "the precise question in issue", *Stoney* v. *New York Life Ins. Co.*, 311 U.S. 464 (1940).

In the absence of an authoritative state decision on the *precise issue in question* or construing the *precise statute*, the Supreme Court will "ordinarily accept the determinations of courts of appeals on questions of State law," *Richards* v. *United States*, 369 U.S. 1 (1962), and will not disturb their decisions on State law unless the "conclusions are shown to be unreasonable" or "clearly erroneous or unreasonable," *United States* v. *Durham Lumber Co.*, *supra*; there is "a definite conviction of error," *Helvering* v. *Stewart*, 317 U.S. 154 (1942); or it can be said with "certainty that the Court of Appeals holdings was wrong." *Spiegel's Estate* v. *Commissioner of Internal Revenue*, 335 U.S. 701 (1949). The decision will be upheld if "reasonable arguments can be based on [State] cases to support a determination" of the question "either for or against the Petitioner," *Spiegel's Estate*, *supra*.

Moreover, in the absence of a state court decision deciding "the precise issue of state law" or "construing the relevant" state statute, the Supreme Court will leave undisturbed the interpretation placed upon purely local law by a court composed of three judges (including a judge of long experience in the jurisprudence of the state) who are constantly re-

quired to pass upon law questions of the state, *Spiegel's Estate* v. *Commissioner of Internal Revenue, supra; MacGregor* v. *State Mutual Life Ass. Co., supra;* and *United States* v. *Durham Lumber Co., supra.* The challenged decision was rendered by three judges who are constantly required to pass upon the law of Texas and was written by Judge Joseph C. Hutcheson, a judge with many years experience in applying Texas law on the Court of Appeals and District Court and in private practice. In attacking the judgment of these lawyers skilled in the law of Texas, Petitioner has not shown that it conflicts with a statute or authoritative decision of a Texas court or presented any evidence, much less convincing evidence, that the courts of Texas would have decided the issue differently.

B. Alleged Conflict With Decision of Texas Supreme Court

In citing *Magnolia Pipeline Co.* v. *City of Tyler,* 348 S.W. 2d 537 (Tex. Civ. App. 1961, error ref.), Petitioner errs in characterizing it as a decision of an intermediate court and asserting that it conflicts with the decision below. This case, in effect, is a decision of the highest court of Texas,[2] and does not conflict with the decision below.

This case does not hold "that counties and cities in Texas may be required to compensate for adjustments of pipelines crossed by new streets or highways". The court held that a *city* which uncovered pipelines while cutting and grading one street and "attempting to pave very near" a pipeline on another street, was liable for the *lowering* and encasing of such pipelines because the necessity for such adjustments *resulted from the street improvement.* The

[2] The Supreme Court adopted the opinion of the Court of Civil Appeals by unqualifiedly refusing the application for writ of error. See Appendix B, pp. .....

precise issue decided was the liability of a *city*, not a county, resulting from improvement of a *city* street, not acquisition of right-of-way for a State Highway. The ultimate holding of the court is simply that Magnolia was entitled to compensation. The court did not determine whether the compensation was for a taking or damaging of property. No taking of an easement was involved, however, because the city street had been placed over the easement several years prior to the paving project prompting the suit.

Summarizing, this case decided issues relating to a *city*, not a county; a *city street*, not a State Highway; *improvement of a city street*, not acquisition of right-of-way for a State Highway. Stated differently, liability was based upon the results of improving streets, the statutes governing counties and highways were not construed, and the precise issue here was not decided. The precise issue was more nearly involved in *State* v. *City of Austin, supra*, than in *Magnolia Pipeline Co.*, and the highest court held that relocation expense was *a part of construction.*

Under the law as announced by the highest court of Texas, a decision which does not construe or pass upon the validity of a statute, or in which a disputed issue is not raised, or is not founded upon substantially the same state of facts, is not stare decisis or binding upon courts later considering the statute or precise issue. *Valmont Plantations* v. *State*, 355 S.W. 2d 502 (Tex. Sup. 1962); *State* v. *J. M. Huber Corporation*, 199 S.W. 2d 501 (Tex. Sup. 1947); *Eubanks* v. *State*, 203 S.W. 2d 339 (Tex. Civ. App. 1947, error ref.); *Joslin* v. *State*, 146 S.W. 2d 208 (Tex. Civ. App. 1940, error ref.). Not having construed the statutes involved or decided the precise issue as to the power of a county, *Magnolia Pipeline Co.* does not conflict.

Vernon's Ann. Civ. Stat., Article 1728, vests jurisdiction in the Texas Supreme Court when "one of the Courts of

Civil Appeals holds differently from a prior decision of another Court of Civil Appeals . . . upon any question of law material to a decision of the case". If the opinion below had been a Texas intermediate court decision, the Texas Supreme Court would not have had jurisdiction to review on the ground that it conflicted with *Magnolia Pipeline Co.* because decisions are not in conflict unless they are "so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other". *Dockum* v. *Mercury Ins. Co.*, 135 S.W. 2d 700 (Tex. Sup. 1940). Petitioner asks this Court to find a conflict which the Texas Supreme Court could not find.

C. Alleged Conflict With Decisions of Intermediate Courts

Erroneously urging that, under the holdings of this Court, the Court of Appeals "was obligated", blindly, "to follow" decisions of intermediate courts, Petitioner asserts that *McLennan County* v. *Sinclair Pipeline Company*, 323 S.W. 2d 471 (Tex. Civ. App. 1959, error ref. n.r.e.), and *Sinclair Pipeline Company* v. *State*, 322 S.W. 2d 58 (Tex. Civ. App. 1959), conflict with the decision below. Assuming, for the moment, that this is the guiding principle, Petitioner fails to show conflict.[3]

Neither decision construes the statutes considered by the Court below or decides the precise question in issue. The question of whether an agreement to pay for casing a gas pipeline is an incident of *construction* or acquisition of right-of-way was neither raised nor decided. Each involved the *lowering* of a pipeline, and, while Respondent cannot concede that lowering a pipeline is a part of acquisition of right-of-way, it does *not* smack of construction as much as casing a pipeline, which involves no lowering or removal.

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[3] See discussion infra, pp. 18-20.

Sinclair Pipeline Company is a condemnation suit in which a county sought to acquire, and obtained, a judgment condemning "an easement of right of way". During negotiations for purchase of the easement, the company *lowered* and encased its pipeline upon agreement for reimbursement. The Court of Civil Appeals reversed the trial court judgment awarding no damages upon the holding that since, *by the condemnation suit,* the company's property had been taken, the measure of damages was the cost of adjustment. By seeking condemnation, the county could not deny its power to condemn, and Sinclair did not question, but *conceded* that right. Under this record, no question as to the power of the county under the applicable statutes could have been presented.

Only *lowering,* not casing, a pipeline is involved in *McLennan County.* The case relies heavily upon *Sinclair Pipeline Company* without recognizing the fundamental differences in the suit presented and a condemnation suit. Contrary to Petitioner's assertion that the Court "refused to follow the Federal courts' holding in the *Archer County,* case", the Court misconstrued *Archer County* and followed its misconstruction. The Court states that "the Archer County case holds . . . that Sinclair's easement was in that case taken" and that "the Archer County case is not contrary to the foregoing but actually supports the result herein reached". *Archer County* held that Sinclair's easement was *not* taken, and if the applicable statutes had been presented in *McLennan County, Archer County* would not support the Court's holding. No issue as to the power of a county to pay for lowering a pipeline on a State Highway being presented, the court disposed of the case on the *assumption* that the county had such power.

Neither decision is authoritative in Texas. The Texas Supreme Court was not requested to review *Sinclair,* and,

contrary to Petitioner's claim that the Court "approved the result", refused to approve *McLennan County*.[4] Again, the fact that the Texas Supreme Court would not have had jurisdiction to review the decision of the Court below if it had been an opinion of a Texas intermediate court on the ground of conflicting with these decisions is conclusive proof of lack of conflict.

The opinions of the Attorney General of Texas are equally irrelevant. The opinions proceed on the assumption that requiring adjustment of pipelines involves acquisition of right-of-way and do not discuss or rule on the extent of a county's power under the statutes construed by the Court below. None of the opinions consider or discuss the relative duties of the Highway Department and counties and the difference between construction and acquisition of right-of-way. None recognize the distinction between a taking and damaging. Each demonstrates, without recognizing, the difference between acquisition of right-of-way and paying for adjustment of a pipeline, by noting that if a price cannot be agreed upon, the county would have to "condemn the easement" — not condemn the right to lower or case the pipeline. As evidenced by WW-1090, the opinions recognize no distinction between a county road and a state highway. WW-125 points out that the cost of lowering and encasement would not be a separate issue, but would be considered in the general issue of the value of the easement taken. Unless an easement is *taken* there is no acquisition of right-of-way.

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[4] See Appendix B, pp. 40-42.

D. Assuming Conflict — Texas Intermediate Court Decisions Have No Precedential Value And There Is Convincing Evidence The Texas Supreme Court Would Decide Differently

Petitioner erroneously argues that, under the rules announced by this Court, the court below was compelled to follow the cited decisions of the Courts of Civil Appeals. The quest is for the "law of the State" which is determined "from all the available data," including decisions of intermediate courts, when authoritative, and in some instances lower courts. *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223 (1940); *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940). Such decisions may be disregarded, however, where there is "persuasive data that the highest court of the state would decide otherwise." In states where decisions of an intermediate or lower court may be ignored by other courts of similar jurisdiction, the Federal court is not bound by such a decision. *King* v. *Order of United Commercial Travelers of America*, 333 U.S. 153 (1948).

The precedential value of opinions of Courts of Civil Appeals is determined by the notation of the Texas Supreme Court in refusing to review them. When the notation is an unqualified "Refused," the Supreme Court adopts the opinion of the Court of Civil Appeals.[5] When the refusal to review is stamped "Refused, No Reversible Error," it means, and only means, that the application for writ of error presented no error which required reversal, (through omission or otherwise) and does not mean that the Supreme Court approves any holding stated in the opinion of the Court of Civil Appeals or approves the judgment entered. Such cases "are but persuasive only, with little precedential value."[6]

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[5] See Appendix B. pp. 40, 41.
[6] See Appendix B. pp. 40-42.

Entry of such notation by the Texas Supreme Court, like denial of a petition for writ of certiorari by this Court, "imports no expression of opinion upon the merits of the case". *Agoston* v. *Commonwealth of Pennsylvania*, 340 U.S. 844 (1950).

There are eleven Courts of Civil Appeals in Texas, and it has been held uniformly that *the doctrine of stare decisis is not applicable to a decision of such courts*, and one court is not bound to follow the holding of another unless it is satisfied with the reasoning of the decision.[7] *A Court of Appeals can have no greater obligation.*

Inasmuch as a Court of Appeals "adjudicating a State-created right solely because of diversity of citizenship of the parties is for that purpose, in effect, only another court of the State", *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 108 (1945), the Court below was no more bound by *McLennan County* and *Sinclair Pipeline Company* than other Texas Courts of Civil Appeals. The status of the decision of the Court of Civil Appeals is more comparable to the common pleas decision considered in *King* v. *Order of United Commercial Travelers*, 333 U.S. 153 (1948), and is not the same as opinions of intermediate and lower courts considered in *State of California* v. *Taylor*, 353 U.S. 553 (1957), *Fidelity Union Trust Company* v. *Field*, 311 U.S. 169 (1940), and similar cases. Like a decision of the Court of Common Pleas of South Carolina, an opinion of a Court of Civil Appeals is not taken in the State as "authoritative expositions of that State's 'law' ", does not exact conformity from the same court or other Courts of Civil Appeals or lesser courts, and may be ignored by other Courts of Civil Appeals. As *King* concludes, "it would be incongruous indeed to hold the Federal Court bound by a decision which would not be binding on any State court".

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[7] See Appendix B. pp. 43, 44.

Irrespective of the precedential value of the cases cited by Petitioner, there is convincing evidence that the highest court of Texas would decide differently. This evidence, which was before the court below, consists of the refusal of the Texas Supreme Court to approve the decisions cited by Petitioner, the holding in *Archer County*, the Texas decisions cited in *Archer*, the Texas statutes (none of which were reviewed by such decisions), and the decision of the Texas Supreme Court in *State* v. *City of Austin*, *supra*, that the cost of relocation of a utility is an expense of construction.

E. Alleged Conflict With Federal Decisions

The Federal decisions cited by Petitioner do not conflict with the holding below. None decide the question of whether adjustment of a pipeline is an incident of construction or acquisition of right-of-way as those terms are used in Texas statutes, or construe any of the Texas statutes or adjudicate the power of a Texas county. While these cases characterize certain acts as "takings", they actually refer to a damaging. Under Texas law, Petitioner's easements have not been taken, as Petitioner is still using them, and any result from the construction of the highway is a damaging — not acquisition of right-of-way.

III.

ADDITIONAL GROUNDS PRESENTED TO THE COURT OF APPEALS

In addition to the ground stated in the opinion below, Respondent presented other grounds which support the judgment, and may urge those grounds to this Court. *Le-Tulle* v. *Scofield*, 308 U.S. 415 (1940); *Langnes* v. *Green*, 282 U.S. 531 (1931).

A. Assuming An Agreement To Pay For The Cost of Encasement is Acquisition of Right-of-Way, Conditions Precedent to Vesting Such Power In Respondent Were Not Performed

A Texas county has only such powers as are expressly granted by statute, and must exercise its powers in the manner prescribed by statute. When a statute imposes a condition precedent to the exercise of a power, *the condition must be performed if the power is to be exercised. Canales* v. *Laughlin*, 214 S.W. 2d 451 (Tex. Sup. 1948). To vest power in a Texas county to acquire right-of-way for a State highway, the State Highway Commission must have determined the necessity for acquiring the right-of-way, contracted with the County to acquire the right-of-way, requested the county to acquire particular parcels, and furnished the county plats or field notes and right-of-way deeds of the parcels to be acquired.

In two places, Vernon's Ann. Civ. Stats., Article 6674n, authorizes a county to acquire right-of-way *only* when "in the judgment of the State Highway Commission" such acquisition is necessary. There is no evidence of action of the State Highway Commission determining that acquisition of right-of-way from Petitioner was necessary. The statute is permissive and does not impose any duty on a county to acquire right-of-way until its has contracted to do so. *Traders' Compress Co.* v. *State*, 77 S.W. 2d 245 (Tex. Civ. App. 1934); *Sinclair Pipeline Company* v. *Archer County*, 245 F. 2d 79 (CCA 5, 1957). There is evidence of a contract between the Commission and the County as to Highway 69, but none as to F.M. Highway 418.

The statute charges the Commission with the duty of furnishing the county "plats or field notes of such right-of-way or land," "*after* which the Commissioners' Court

may, and is hereby authorized to purchase or condemn the same . . . in accordance with such field notes". In the court below, Petitioner admitted the undisputed facts that the Commission made no request to Respondent to acquire right-of-way from Petitioner and did not furnish plats or field notes of its easements. The Commission furnished right-of-way deeds (with the name of the grantor) on all parcels of land desired, but furnished none as to Petitioner's easements. The furnishing of information necessary to negotiate and condemn is a condition precedent to vesting power to acquire right-of-way in Respondent. *Sacred Gardens of Memory, Inc.* v. *State*, 334 S.W. 2d 220 (Tex. Civ. App. 1960); *Sinclair Pipeline Company* v. *Archer County, supra.*

It is only "after" the county has been furnished this information that it is "authorized to purchase or condemn" right-of-way. The mandate to furnish field notes "for purchase or condemnation" necessarily includes a duty to furnish the name of the grantor. The statute contemplates a purchase, and condemnation if purchase is impossible. The statute requires the procedure of the general condemnation statutes (which require negotiation with the owner) to be followed. Proof of negotiation is a condition precedent to vesting jurisdiction of a condemnation case in the courts. *City of Houston* v. *Derby*, 215 S.W. 2d 690 (Tex. Civ. App. 1948, error ref.). Respondent could not attempt to comply with the statutory condemnation procedure until the Commission had furnished it field notes and the name of the grantor.

The State Highway Commission not having requested acquisition of Petitioner's easements or furnish data necessary for acquisition, the conditions precedent prescribed by the statute were not performed and the power to acquire right-of-way from Petitioner did not vest in Respondent.

B. Petitioner's Encasement Was The Performance Of A Legal Duty Assumed As An Incident Of Exercising The Privilege Of Placing Its Pipeline Across A State Highway.

The Legislature of Texas has plenary power to control and regulate its highways, may delegate this power to political subdivisions or other arms of the State, and may grant utilities the privilege of crossing highways. *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960). In delegating the power to control highways and granting the privilege to utilities to cross a highway, *the power of the Legislature is subject to an important constitutional limitation.* Tex. Const., Article I, Section 17, provides in pertinent part:

> ". . . no irrevocable or *uncontrollable* grant of special privileges or immunities shall be made, but *all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof.*"

By force of this section, legislative delegation of the power to control highways imposes the attendant duty of exercising control over privileges and franchises to use highways, and whether expressed in the statute or not, legislative grant to a utility of the privilege of crossing a highway is subject to the continued control of the State or its arm to impose additional burdens upon the exercise of the privilege. *Storrie* v. *Houston City St. Ry. Co.*, 46 S.W. 796 (Tex. Sup. 1893); *Mayor of City of Houston* v. *Houston City St. Ry. Co.*, 19 S.W. 127 (Tex. Sup. 1892); *Fleming* v. *Houston Lighting & Power Co.*, 138 S.W. 2d 520 (Tex. Sup. 1940); *Southwestern Telephone & Telegraph Co.* v. *City of Dallas*, 174 S.W. 636 (Tex. Civ. App. 1915, error ref.). Under constitutional and statutory provisions reserving continued control over privileges and franchises, the State reserves the right to

impose additional burdens upon the exercise of a privilege, and acceptance of a privilege is made upon the condition that additional burdens imposed by the State will be performed. *Hamilton Gaslight & Coke Co.* v. *City of Hamilton,* 146 U.S. 258 (1892); *Sioux City Street Ry. Co.* v. *Sioux City,* 138 U.S. 98 (1891). These authorities leave no doubt that the Legislature of Texas can require a utility accepting the privilege of laying a pipeline across a State highway, as an incident of exercising the privilege, to assume the additional burden of casing its pipeline in right-of-way acquired for widening the highway.

Review of the Texas statutes granting to utilities the privilege to lay and maintain facilities cross public highways demonstrates that the Legislature, in granting the privilege, imposed the burden (which is accepted by exercise of the privilege) on utilities to adjust their facilities in the original highways and right-of-way acquired for widening. Study will also show that the Legislature had delegated to the Texas Highway Department the exclusive power to control and regulate State highways, and that such power has been granted with the attendant duty of exercising the constitutional control over privileges to use highways.

The Legislature has generously granted railroads and utilities the privilege to lay and maintain their facilities across public highways. Vernon's Ann. Civ. Stat. Articles 6320, 6327, 1436, 1436a, 1436b, 1497, and 6020. In recognition of the constitutional reservation of continued control of privileges, these statutes impose the burden upon a utility accepting the privilege to adjust its lines, in or outside of the original bounds of a highway or stream, to conform to public improvements. After granting the privilege to cross public highways and streams, the pipeline statutes provide:

". . . pipes may be placed under the ground, *as the exigencies of the case may require.*" Article 1436.

". . . *the Highway Commission . . . may require any such . . . corporation . . . at its own expense to relocate its pipes,* mains, . . . for conducting gas on a state highway . . . *so as to permit the widening or changing of traffic lanes,* by giving thirty (30) days written notice to such . . . corporation . . . and specifying the facility or facilities to be moved and indicating the place *on the new right-of-way* where such facility or facilities may be placed. * * * Such . . . corporation shall replace the grade and surface of such road or highway at its own expense." Article 1436b.

"said pipes and pipelines shall be so buried and covered *as not to interfere with the use and occupancy of such road, highway, street or alley by the public . . .*". Article 1497.

"the right to run pipelines . . . across or over any public road or highway can only be exercised *upon condition that the traffic thereon be not interfered with, and that such road or highway be promptly restored to its former condition of usefulness,* and the restoration thereof to be subject also to the supervision of the Commissioners' Court or other proper local authority." Article 6021.

Although it is arguable that the express language of these statutes does not spell out clearly that a utility exercising the privilege of crossing a highway has the burden to adjust its lines for subsequent improvement or widening, the judicial construction of similar language in the railroad statutes removes the argument.

The statutes, Vernon's Ann. Civ. Stat., Articles 6320 and 6327, granting the privilege to railroads to cross public highways and streams, require a railroad to restore the stream or highway "to its former state, or to such

state as not to unnecessarily impair its usefulness", and keep its roadbed across any highway "in a proper condition for the use of the travelling public."

The similarity of language in the railroad and pipeline statutes is obvious. Again, it may be questioned that the language of the railroad statutes expressly require a railroad to adjust facilities outside of the original bounds of a highway or stream to conform to the improvement or widening thereof, but "informed local courts" have found "meaning not discernable to the outsider". *Louisiana Power & Light Co.* v. *City of Thibodeux*, 360 U.S. 25 (1959). The informed Texas Supreme Court has found that the quoted language requires railroads to construct their lines across public highways and streams in the first instance in accordance with State requirements, and, if they desire to continue to exercise the privilege, to make such changes in their lines, in or outside of the bounds of the original highway or stream, as the State may require in improving or widening the public way. *Chicago R. I. & G. RR. Co.* v. *Tarrant County Water Control & Improvement District*, 73 S.W. 2d 55 (Tex. Sup. 1934); *Missouri K & T R. Co.* v. *Rockwall County Levee Improvement District*, 297 S.W. 206 (Tex. Sup. 1927); *Gulf C & S.F. Ry. Co.* v. *Milam County*, 38 S.W. 747 (Tex. Sup. 1897).

Respondent does not cite these decisions for the proposition that the scope of the police power of a state dealing with railroads and pipelines is the same, but cites them to show the meaning given to the language of the railroad statutes, which is practically identical with that of the pipeline statutes. Since the railroads entered Texas before other privileged corporations, the statutory privilege of railroads to cross public highways and streams, with its attendant burdens, was first granted and construed. The similar language of the pipeline statutes has not been construed, but since the cases construing the railroad statutes were decided long prior to the enactment of the gas statutes,

their judicial construction "must be read into the analogous pipeline statutes". *Lone Star Gas Company* v. *State,* 153 S.W. 2d 681 (Tex. Sup. 1941); *Humble Pipe Line Co.* v. *State,* 2 S.W. 2d 1018 (Tex. Civ. App. 1928, error ref.).

The controlling point is the meaning of the pipeline statutes, and the Texas Supreme Court reads the judicial construction of the railroad statutes that the privileges granted are subject to the continuing duty of the railroad to adjust its lines for widening or improving a highway or stream "into the analogous pipeline statutes". No other construction can be given to the pipeline statutes. The mandate of the Constitution must be read into every statutory grant of privilege. The very existence of the constitutional mandate requires the judiciary to construe pipeline statutes to mean that such companies have a continuing duty to adjust their lines, in or outside of the original bounds of the highway, to conform to improvement or widening of the highway.

Under the express language of the pipeline statutes, as judicially construed, the privilege of using the highways imposes, as a condition of the grant, the duty on Petitioner to make such adjustments as the State might thereafter require in improving or widening the highway. Although Petitioner had no obligation to accept the privilege, when it exercised the privilege, it did so subject to the condition that it would comply with the requirement of the State for improving or widening the highway. Under statutes, when the Highway Department requested adjustment, Petitioner had a legal duty to encase its pipelines in the widened areas and performance of this legal duty is not a sufficient consideration to support the alleged promise of Respondent.

Irrespective of the pipeline statutes, however, the Texas Highway Department had the power and duty to require the questioned encasement. The Legislature has delegated

its plenary control of state highways to the Department, Vernon's Ann. Stats., Articles 6663, 6673, 6665, 6667, 6666, 6674q-4. The foregoing statutes, read in light of the Texas Constitution, evidence a complete delegation of the power of the State to control state highways, with its *attendant duty* of exercising continued control over privileges and franchises to use highways. Under this delegated power and duty the Highway Department required that all gas pipelines be cased from right-of-way line to right-of-way line (R. 186), and after Petitioner's acceptance of a permit under this regulation, requested the adjustment in the widened area. *Such request was an exercise of the constitutionally reserved power.*

The conclusion is manifest that by virtue of the general delegation by the Legislature to the Highway Department of exclusive control of the State highways, with the accompanying constitutional reserved power, the State Highway Department was not only authorized but compelled to require Petitioner to encase its lines in the widened areas. Petitioner owed a legal duty to comply with the request, and performance of this legal duty was not a sufficient consideration for any alleged promise of Respondent to pay for its cost.

C. Petitioner's Encasement Was The Performance Of A Legal Duty In Response To The Exercise Of The Police Power Of The State Of Texas.

The undisputed evidence shows and the District Court found that an unencased gas pipeline constitutes a definite hazard to vehicular traffic, the highway and the pipeline. (R. 28, 69, 70, 97, 115 and 116). The danger of explosion, with its consequent injury to persons, property and the highway, was the basis of the Texas Highway Department requiring encasement and requesting Petitioner to make

the additional encasement. Petitioner submits that this is a proper basis for invoking the police power, and that independently of the constitutional reserved power, Petitioner owed a legal duty to comply with the requirement of the Highway Department.

Upon a record that failed "to disclose that appellant's lines were the cause of serious danger to the public", *Panhandle Eastern Pipeline Company* v. *State Highway Commission,* 294 U.S. 613 (1935), declared that, in exercising the police power, pipelines are not upon the same footing as railroads. This case is not controlling because the record here does show that Petitioner's gas pipelines constitute a definite hazard and serious danger to the public.

Panhandle Eastern, decided in 1934, has never been cited by this Court, and the change of conditions since then may well be the reason for its lack of citation. Compared to today, the automobile industry was in its infancy in 1934, and while no question of public safety may have been apparent to the court then, with the present traffic and loads of vehicular traffic on modern highways, the requirement of encasement is necessary to protect the public. The change of conditions during the period certainly requires a new look as to the scope of police power in regulating gas pipelines.

Respondent submits that Petitioner owed a legal duty to submit to the police power of the State, and that the performance of a legal duty is not a sufficient consideration to support a contract with Respondent.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, Hardin County, a member of the Bar of the Supreme Court of the United States, certifies that a copy of the foregoing Brief in Opposition has been served upon Petitioner, Trunkline Gas Company, by delivering same to Mr. Cecil M. Cook, 1100 Esperson Building, Houston 2, Texas, counsel for Petitioner, in person, this 21st day of June, 1963.

.....

William Robert Smith
Counsel for Respondent

Statutes

Vernon's Ann. Civ. Stats., Article 1436 (Revised Civil Statutes of Texas of 1925, Vol. I, p. 427, Art. 1436)

> Such corporation shall have the right and power to enter upon, condemn and appropriate lands, right of way, easements and property of any person or corporation, and shall have the right to erect its lines over and across any public road, railroad, railroad right of way, interurban railroad, street railroad, canal or stream in this State, any street or alley of any incorporated city or town in this State with the consent and under the direction of the governing body of such city or town. Such lines shall be constructed upon suitable poles in the most approved manner and maintained at a height above the ground of at least twenty-two feet; or pipes may be placed under the ground, as the exigencies of the case may require.

Vernon's Ann. Civ. Stats., Article 1497 (Revised Civil Statutes of Texas of 1925, Vol. I, p. 440, Art. 1497)

> Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, right of way, easements and property of any person or corporation. Such corporation shall have the right to lay its pipes and pipe lines across and under any public road or highway, or under any railroad, railroad right of way, street railroad, canal or stream in this State, and to lay its pipes and pipe lines across or along and under any street or alley in any incorporated city or town in this State with the consent and under the direction of the governing body of such city or town. No pipe lines shall be laid parallel with and on any public highway, closer than fifteen feet from the improved section thereof, except with the approval and under the direction of the commissioners' court of the county in which such highway is located. Said pipes and pipe lines shall be so buried and covered as not to interfere with the use and occupancy of such road,

highway, street or alley by the public, or use and occupancy of such railroad or street railroad by the owner or owners thereof. Such pipes or pipe lines shall not pass through or under any cemetery, church or college, school house, residence, business, or storehouse, or through or under any building in this State, except by the consent of the owner or owners thereof. All such pipes and pipe lines, when same shall pass through or over the cultivated or improved lands of another, shall be well buried under ground at least twenty inches under the surface, and such surface shall be properly and promptly restored by such corporation unless otherwise consented to by the owners of such land. When such pipes and pipe lines shall be laid over or along any uncultivated or unimproved lands of another, and such lands shall thereafter become cultivated or improved, such pipes or pipe lines shall be buried by said corporation as herein provided for cultivated lands, within a reasonable time after notice by the owner of such lands, or his agent, to said corporation or any agent thereof.

Vernon's Ann. Civ. Stats., Article 1436b (Texas Acts 1951, 52nd. Leg., Ch. 470, p. 829)

Section 1. Any person, firm or corporation or incorporated city or town engaged in the business of transporting or distributing gas for public consumption shall have the power to lay and maintain pipes, mains, conductors and other facilities used for conducting gas through, under, along, across and over all public highways, public roads, public streets and alleys, and public waters within this State; provided that within the corporate limits of an incorporated city or incorporated town such right shall be dependent upon the consent and subject to the direction of its governing body. Any such person, firm or corporation or incorporated city or town shall notify the State Highway Commission or the Commissioners Court having jurisdiction, as the case may be, when

it proposes to lay any such pipes, mains, conductors and other fixtures for conducting gas within the right-of-way of any state highway or county road outside the limits of an incorporated city or incorporated town, whereupon the Highway Commission or the Commissioners Court, if it so desires, may designate the place upon the right-of-way where the same shall be laid. The public agency having jurisdiction or control of a highway or county road, that is, the Highway Commission or the Commissioners Court, as the case may be, may require any such person, firm or corporation or incorporated city or town at its own expense to relocate its pipes, mains, conductors or other fixtures for conducting gas on a state highway or county road outside the limits of an incorporated city or incorporated town so as to permit the widening or changing of traffic lanes, by giving thirty (30) days written notice to such person, firm or corporation or incorporated city or town and specifying the facility or facilities to be moved and indicating the place on the new right-of-way where such facility or facilities may be placed. Such person, firm or corporation or incorporated city or town shall replace the grade and surface of such road or highway at its own expense.

Sec. 2. If after the effective date of this Act an unincorporated area becomes incorporated, any person, firm or corporation or incorporated city or town which, at the date of such incorporation, has pipes, mains, conductors or other facilities within such area so incorporated, may continue to exercise the rights conferred by Section 1 hereof for ten (10) years after the date of such incorporation without consent but subject to the direction of the governing body.

Sec. 3. [General repealer.]

Sec. 4. If any section, sentence, phrase, clause or any part of any section, sentence, phrase or clause of this Act shall for any reason be held invalid, such decision shall not affect the remaining portions of this

Act; and it is hereby declared to be the intention of this Legislature to have passed each section, sentence, phrase, clause, or part thereof, irrespective of the fact that any other section, sentence, phrase or clause or part thereof may be declared invalid.

Vernon's Ann. Civ. Stats., Article 6021 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1720, Art. 6021)

The right to run pipe lines, telegraph and telephone lines along, across or over any public road or highway can only be exercised upon condition that the traffic thereon be not interfered with, and that such road, or highway be promptly restored to its former condition of usefulness, and the restoration thereof to be subject also to the supervision of the commissioners court or other proper local authority. In the exercise of the privileges herein conferred, such pipe lines shall compensate the county or road district, respectively, for any damage done to such public road. Nothing herein shall be construed to grant any pipe line company the right to use any public street or alley of any incorporated city or town, except by express permission from the governing body thereof.

Vernon's Ann. Civ. Stats., Article 6320 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1798, Art. 6320)

Such corporation shall have the right to construct its road across, along, or upon any stream of water, water course, street, highway, plank road, turnpike, or canal when the route of said railway shall intersect or touch; but such corporation shall restore the stream, water course, street, highway, plank road, turnpike, or canal thus intersected or touched, to its former state, or to such state as not to unnecessarily impair its usefulness, and shall keep such crossing in repair.

Vernon's Ann. Civ. Stats., Article 6327 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1799, Art. 6327)

> Every railroad company in this State shall place and keep that portion of its roadbed and right of way, over or across which any public county road may run, in proper condition for the use of the traveling public, and in case of its failure to do so for thirty days after written notice given to the section boss of the section where such work or repairs are needed by the overseer of such public road, it shall be liable to a penalty of ten dollars for each week such railroad company may fail or neglect to comply with the requirements of this article. Such penalty shall go to the road and bridge fund of the county in which the suit is brought; and the county attorney, upon the making of an affidavit of the facts by any person, shall at once institute against the company violating any provision of this article suit in the proper court to recover such penalty or penalties, and his wilful failure or refusal to do so shall be sufficient cause for his removal from office, unless it is evident that such suit could not have been maintained. The proceedings under this article shall be conducted in the same manner as civil suits. The county attorney attending to such suits shall be entitled to a fee in each case of ten dollars, to be taxed as costs; provided, that when two or more penalties are sought to be recovered in the same suit, but one such fee shall be allowed. Such suits shall be conducted in the name of the county, and if the county be cast in the suit no costs shall be charged against it.

Vernon's Ann. Civ. Stats., Article 6663 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1898, Art. 6663)

> The administrative control of the State Highway Department, hereinafter called the Department, shall be vested in the State Highway Commission, hereinafter called the Commission, and the State Highway Engineer. Said Department shall have its office at Austin where all its records shall be kept.

Vernon's Ann. Civ. Stats., Article 6665 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1898, Article 6665)

> The Commission shall hold regular meetings once each month. They shall attend the same and such special or called meetings as they may provide by rule or the chairman may call. They shall formulate plans and policies for the location, construction and maintenance of a comprehensive system of State highways and public roads. They shall biennially submit a report of their work to the Governor and the legislature, with their recommendations and those of the State Highway Engineer. A quarterly statement containing an itemized list of all moneys received and from what source and of all money paid out and for what purpose shall be prepared and filed in the records of the Department and a copy sent to the Governor. These records shall be open to public inspection.

Vernon's Ann. Civ. Stats., Article 6666 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1898, Art. 6666)

> The Commission shall establish and make public proclamation of all rules and regulations for the conduct of the work of the Department as may be deemed necessary, not inconsistent with the provisions of law. They shall maintain a record of all proceedings and official orders and keep on file copies of all road plans, specifications and estimates prepared by the Department or under its direction.

Vernon's Ann. Civ. Stats., Article 6667 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1899, Art. 6667)

> The Department shall collect information and compile statistics relative to the mileage, character and condition of the public roads in the different counties, and the cost of construction of the different classes of roads in the various counties. It shall investigate and

determine the methods of road construction best adapted to the different sections of the State, and shall establish standards for the construction and maintenance of highways, bridges and ferries, giving due regard to all natural conditions and to the character and adaptability of road building material in the different counties. The Department may, at all reasonable times, be consulted by county and city officials for any information or assistance it can render with reference to the highways within such counties or cities, and it shall supply such information when called for by city or county officials; and it may in turn call upon all such officials for any information necessary for the performance of its duties hereunder. Upon request of the commissioners court of any county, the Department shall consider and advise concerning general plans and specifications for all road construction to be undertaken from the proceeds of the sale of bonds or other legal obligations issued by a county, or by any subdivision or defined district of a county; and such information and advice shall be so obtained before any of the proceeds from such bond issues are expended by or under the direction of the commissioners court.

Vernon's Ann. Civ. Stats., Article 6674a (Texas Acts 1925, 39th Leg., Ch. 186, p. 456, Sec. 1)

The term "highway" as used in this Act shall include any public road or thoroughfare or section thereof and any bridge, culvert or other necessary structure appertaining thereto. The term "improvement" shall include construction, reconstruction or maintenance, or partial construction, reconstruction or maintenance and the making of all necessary plans and surveys preliminary thereto. The term "Commission" refers to the State Highway Commission and the term "Department" refers to the State Highway Department.

PRECEDENTIAL VALUE OF OPINIONS OF TEXAS COURTS OF CIVIL APPEALS

Review by the Texas Supreme Court of a judgment of a Court of Civil Appeals is not a matter or right.

Vernon's Ann. Tex. Rules of Civ. Proc. Rule 467 (Vol. 3, p. 394), provides:

> "The Supreme Court may review final judgments of Courts of Civil Appeals upon writ of error, when good cause therefor be shown by application for such writ, as hereinafter required, the sufficiency of such cause to be determined as herein provided."

Vernon's Ann. Tex. Rules of Civ. Proc., Rule 483 (Vol. 3, p. 440), provides in part:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused'. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No Reversible Error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, 'Dismissed for want of jurisdiction.'

Under this rule, refusal of the application with the docket notation "Refused" adopts the opinion of the Court of Civil Appeals. *Thompson* v. *Gibbs*, 240 S.W. 2d 287 (Tex. Sup. 1951); *State* v. *Larimore*, 295 S.W. 2d 654 (Tex. Sup. 1956). Entry of this docket notation gives the opinion "the same precedential value as one of the Supreme Court's

own opinions". Calvert, *The Application for Writ of Error,* 3 Franki, Texas Rules of Civil Procedure 404, 410 (1955).

Entry of the notation, "Refused. No reversible error", means, and only means, that the application for writ of error "presents no error which requires reversal" of the judgment. Entry of this notation does not mean that the Supreme Court approves any holding stated in the opinion of the Court of Civil Appeals, and does not even mean that the Supreme Court approves the judgment entered by that court. Calvert, *The Application for Writ of Error,* 3 Franki, Texas Rules of Civil Procedure 404 (1955); Simpson and Wall, *Problems of Precedent Affecting Courts of Civil Appeals' Opinions,* 4 S.W.L.J. 398 (1950); Simpson, *Notations on Application for Writ of Error,* 12 Texas Bar Journal 547 (1949).

As stated by Chief Justice Calvert, the present Chief Justice,

> "Cases decided by the Courts of Civil Appeals in which the writ of error was . . . 'Refused, no reversible error' *are but persuasive only, with little precedential value.*"
>
> • • •
>
> The notation 'Refused. No reversible error' is applied automatically if the opinion of the Court of Civil Appeals has dealt with questions . . . *which are not brought forward by points of error for review by the Supreme Court . . .*".

In the suggested instance, entry of the notation does not approve the judgment. In *Gillette* v. *Achterberg,* 325 S.W. 2d 384 (Tex. Sup. 1959), the Court of Civil Appeals, upon two separate and independent grounds, reversed and remanded a judgment granting petitioner's motion for sum-

mary judgment, and the petitioner's application attacked only one of these grounds. Noting that the decision below rested "upon two separate and independent grounds, either of which, if correctly decided or immune to review, will support the judgment of reversal and remand", the Texas Supreme Court held:

> "Since the first question is not raised in the application for writ of error, however, we would be required to affirm the judgment of the Court of Civil Appeals even if the application were granted and every point of error therein sustained. City of Deer Park v. State, 154 Tex. 174, 275 S.W. 2d 77. The application for writ of error is accordingly refused, no reversible error."

By entry of the notation "Refused. No reversible error" in *Gillette*, the Supreme Court did not even approve the judgment. Similarly, when an opinion of a Court of Civil Appeals discusses only one of several points presented by the petitioner and petitioner's application for writ of error attacks only the point discussed, entry of the notation does not even approve the judgment.

To his observation that opinions of the Court of Civil Appeals have "little precedential value", Chief Justice Calvert might well have added that their precedential value, whether little or none, can only be determined by inspection of the briefs in the Court of Civil Appeals and the application for writ of error. Following rendition of the opinion in *City of Abilene* v. *Bailey*, 345 S.W. 2d 540 (Tex. Civ. App. 1961, error ref. n.r.e.), the petitioner did not assign as error, in either its motion for rehearing in the intermediate court or application for writ of error to the Supreme Court, the holding that certain action constituted a taking or damaging of property. The Supreme Court entered the notation, "Refused. No reversible error". In *City of Abilene*

v. *Downs*, 367 S.W. 2d 153 (Tex. Sup. 1963), the Supreme Court points out that the petitioner there understandably interpreted the refusal of the application to indicate approval of the holding, but that it did not because the point "was not properly preserved for review".

The lack of precedential value is demonstrated by the holdings of the Courts of civil Appeals that the holding of one is not stare decisis or binding upon another.

In *Calvary Temple* v. *Taylor*, 288 S.W. 2d 868 (Tex. Civ. App. 1956), the court rejected an opinion of a sister court, holding:

> "Furthermore, being the decision of a court of civil appeals, the doctrine of stare decisis is in no event applicable. In its application to this present litigation, we consider the quoted statement from the court's opinion to have persuasive value only."

In *General American Life Ins. Co.* v. *Rios*, 154 S.W. 2d 191 (Tex. Civ. App. 1941, reversed on other grounds 164 S.W. 2d 521), the court rejected an opinion of another Court of Civil Appeals construing identical provisions of an insurance policy in issue, saying:

> "Despite our high regard for that Court and the ability of the Judge writing the opinion for the Court, we believe the question involved deserves a careful re-examination. If after such careful re-examination our views do not coincide with those expressed in that opinion it is our duty to clearly announce our disagreement therewith."

Malone v. *United States Fidelity & Guaranty Co.*, 9 S.W. 2d 461 (Tex. Civ. App. 1928), observed that another Court of Civil Appeals had rendered two decisions on the point in issue. On one, application for writ of error had been

granted by the Supreme Court and then dismissed by agreement and, on the other, no application was filed. The court disregarded these decisions, holding:

> "This being the status of the two decisions by the Fort Worth court, we think that we should, before following the decisions in those cases, notwithstanding the high standing of that court, be satisfied with the reasoning of those decisions and with the grounds upon which they are based. We are not satisfied that an election of remedies had occurred in those cases, as laid down in the opinions in same."

Similarly, in *Miller* v. *Branch*, 233 S.W. 1032 (Tex. Civ. App. 1921), the court, in response to the appellee's reliance on an opinion of another Court of Civil Appeals as being in conflict with an opinion of that court, held:

> "But, if in any view, it must be said that a conflict exists between the two decisions in relation to the constitutionality of the law, believing, as we do, the decision in the Rumbo case to be well founded and entirely correct, we could not abandon it to adopt the contrary opinion of a court of equal dignity and jurisdiction, notwithstanding the very great respect we entertain for the decisions of that able tribunal."

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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. [redacted] 153

TRUNKLINE GAS COMPANY,
Petitioner,

v.

HARDIN COUNTY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 1125

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Trunkline Gas Company, files this Reply Brief in order to present to the Court a validating act of the Legislature of the State of Texas which became effective after the filing of its petition for a writ of certiorari.

I.

The New Validating Act

Although Respondent did not see fit to bring the fact to the attention of the Court in its brief in opposition, on May 30, 1963, after the filing of Petitioner's petition for a writ of certiorari, a validating act of the Texas Legislature became effective, which not only validates Petitioner's contracts with Respondent which are involved in this case, but also declares the existing Texas law to be contrary to the opinion of the court below. Acts 1963, 58th Legislature, Chapter 240, page 654, provides:

> "Section 1. In the acquisition of all highway rights-of-way by or for the Texas Highway Department, the cost of relocating or adjusting utility facilities which cost may be eligible under the law is hereby *declared to be an expense and cost of right-of-way acquisition.*
>
> "Sec. 2. *All contracts or agreements heretofore made and entered into by the various counties and cities for the purposes stated above are hereby ratified and validated.*
>
> "Sec. 3. All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict.
>
> "Sec. 4. *The fact that the provisions of this Act are necessary in order to clarify existing law* as to the proper classification of costs incurred for the relocation or adjustment of utility facilities as a part of the acquisition of right-of-way creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended; and that this Act shall take effect and be in force from and after its passage, and it is so enacted." (Emphasis supplied).

II.

Petitioner's contracts with respondent having been validated, the judgment of the Court of Appeals should be set aside.

It has been settled by the decisions of the Texas Supreme Court and of this Honorable Court that, upon the enactment of a validating act pending an appeal or petition for certiorari, the new statute will be given effect just as if it had become effective before the institution of the suit. And under this settled rule of law, the validating act quoted above requires that the judgment of the Court of Appeals in this case be set aside and that of the trial court affirmed.

In *Brown* v. *Truscott Independent School District*, 34 S.W. 2d 837, 839 (Tex. Com. App., 1931), the trial court had dismissed Brown's suit against the school district and others for the cancellation of the district's bonds, for an injunction prohibiting the collection of taxes and for judgment declaring the district's creation void. After the hearing of the case by the Court of Civil Appeals, which held the bonds to be valid, the Legislature had enacted a validating act which expressly validated both the creation of the district and the bonds as obligations of the district. On Brown's application for writ of error, the Commission of Appeals expressly refrained from passing upon Brown's assignments of error because the validating act had become effective. The Commission held:

> "To our minds the above [validating] act is sufficient, by its terms, to validate this district and its bonds, both assumed and directly issued, even though it be conceded that the new district was invalid in the beginning, a matter we do not pass upon. The power of the Legislature to enact curative statutes

> of this kind is no longer an open question in this state. [Citing cases.] Under the above authorities we hold this district, together with its bonded indebtednesses, both assumed and directly issued, now legal and valid." • • •
>
> "In this connection we hold that a curative statute enacted by the Legislature, and becoming effective during the pendency of an appeal, writ of error, or even a motion for rehearing on a case to which it applies, cures the defect the same as if such act had become effective before the institution of the suit."

Holding to exactly the same effect are *Desdemona Independent School District* v. *Howard*, 34 S.W. 2d 840 (Tex. Com. App., 1931); *Lyford Independent School District* v. *Willamar Independent School District*, 34 S.W. 2d 854 (Tex. Com. App., 1931); *Hunt* v. *Atkinson*, 17 S.W. 2d 780 (Tex. Com. App., 1929). The Texas courts have accordingly held that bonds, contracts, patents and other acts have been cured or validated by retroactive validating or curative statutes. *City of Deer Park* v. *State*, 275 S.W. 2d 77 (Tex. Sup., 1954) (annexation ordinance); *Duncan* v. *City of Waco*, 81 S.W. 2d 57 (Tex. Sup., 1935) (city bonds, tax levies and annexation ordinance); *State* v. *Bradford*, 50 S.W. 2d 1065 (Tex. Sup., 1932) (patent granting public lands); *Anderson County Road District No. 8* v. *Pollard*, 296 S.W. 1062 (Tex. Sup., 1927) (county road district bonds); *Tom Green County* v. *Moody*, 289 S.W. 381 (Tex. Sup., 1926) (county road bonds); *Nolan County* v. *State*, 17 S.W. 823 (Tex. Sup., 1891) (county road bonds).

This Honorable Court has followed the same rule as to the validity of retroactive validating statutes as the Texas courts. *Kansas City Southern Railway Company* v. *Road Improvement District No. 3*, 266 U.S. 379 (1924) (validating act passed pending appeal); *Charlotte Harbor*

& Northern Railway Company v. *Wells*, 260 U.S. 8 (1922) (validating act passed pending suit); *Bolles* v. *Town of Brimfield*, 120 U.S. 759 (1887) (act validating city bonds after issue). And, in a situation such as presented in this case, this Court has also held that the judgment of the court below should be set aside and the case remanded so that the court below may give effect to a supervening change of the applicable law. *Williams* v. *Georgia*, 349 U.S. 375 (1955); *State Tax Commission of Utah* v. *Van Cott*, 306 U.S. 511 (1939); *Patterson* v. *Alabama*, 294 U.S. 600 (1935); *Dorchy* v. *Kansas*, 264 U.S. 286 (1924); *Gulf, Colorado & Santa Fe Railway Company* v. *Dennis*, 224 U.S. 503 (1912). Thus, in *Patterson* v. *Alabama*, *supra*, 294 U.S. 607, this Court held:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act."

The only qualification as to the validity of a retroactive validating statute which is stated in any of the decisions cited above is that the act or contract validated by the new statute must be one which the legislature could have originally authorized. In this case, that qualification has been met. It has been settled by the Texas Supreme Court that the Legislature could have originally authorized Petitioner's contracts with Respondent. *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup., 1960).* The *Austin* case involved

* Cited by Respondent at page 8 of its brief in opposition.

the relocation and adjustment of utility lines (including pipe lines) originally located entirely within the rights of way of public streets and roads, not facilities originally located in private easements such as Petitioner's here. The utility lines involved had been installed in the public rights of way under statutes which required their owners to relocate or adjust the lines in the public rights of way at their own cost whenever requested by the State to accommodate new highway facilities. The Legislature had thereafter enacted a statute providing the utility owners should be reimbursed when relocation or adjustment was required for the construction in Interstate Highways (Vernon's Ann. Civ. Stats., Article 6674w-4, Acts 1957, 55th Leg., Ch. 300, p. 724). The State sued for judgment declaring the new statute unconstitutional. The Texas Supreme Court held that the statute is constitutional and that the State is required to pay the costs of adjustments and relocations required for Interstate Highways. Under the *Austin* case, the new validating act quoted above is a statute which the Legislature could have validly enacted prospectively. Therefore, as a validating act it is also valid and should be given effect according to its terms by this Court.

Accordingly, under the decisions of this Court and those of the Texas Supreme Court, the judgment of the Court of Appeals should be set aside in order that the new validating act may be given effect.

III.

The new validating act shows the decision of the court below to be in conflict with the applicable Texas law.

The attention of the Court is respectfully called to Section 4 of the new validating act quoted above. This section provides expressly that the new statute is necessary "*to clarify*

existing law." This language clearly shows the law of the State of Texas existing at the time of the Court of Appeals' decision and now is that the cost of adjusting pipe lines was part of the acquisition of rights of way for state highway construction and within the statutory authority of Respondent for right of way acquisition. Therefore, the new statute, like the authorities cited in Petitioner's petition, shows the decision of the Court of Appeals, that Respondent had no statutory power to pay for the adjustments of Petitioner's pipe line, to be erroneous and in conflict with the applicable law of Texas.

Conclusion

For the foregoing reasons and the reasons stated in its petition, Petitioner submits that its petition for a writ of certiorari should be granted and that the judgment of the Court of Appeals should be set aside so that effect may be given to the new statute quoted above.

Respectfully submitted,

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Proof of Service

The undersigned counsel for Petitioner, Trunkline Gas Company, a member of the Bar of the Supreme Court of the United States, certifies that copies of the foregoing brief have been served upon Respondent, Hardin County, by depositing same in the United States Mail, with first class postage prepaid, addressed to Mr. William Robert Smith, 1508 Tower Life Building, San Antonio 5, Texas, and Messrs. Sears and Burns, 1811 C & I Life Building, Houston 2, Texas, counsel for Respondent, this 10th day of July, 1963.

.....

Cecil N. Cook
Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1[redacted]153

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1125

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

To the Honorable Supreme Court of the United States:

Respondent, HARDIN COUNTY, presents this Supplemental Brief in Opposition to Petitioner's Reply Brief.

I.

PETITIONER'S CONSTRUCTION RENDERS SECTION 2 OF THE ACT OF 1963 VOID

Avoiding traverse of the Brief in Opposition and relying solely upon Section 2 of the Act of 1963,[1] Petitioner's Reply Brief tacitly concedes the soundness of the holding of the

[1] Acts 1963, 58th Leg. p. 654, Ch. 240, quoted in Petitioner's Reply Brief, p. 2, and herein referred to as the "Act of 1963."

court below. The court below held that Respondent did not have power to contract to pay Petitioner the cost of casing pipelines in areas acquired to widen State highways. Urging the general rule that the Legislature of Texas may validate any act of a political subdivision which it could have originally authorized, Petitioner construes Section 2 of the Act of 1963 as *retrospectively* creating an obligation on Respondent to pay for such encasement. Respondent recognizes this general rule as to the power of the Legislature, but such power is subject to numerous constitutional limitations which, assuming the correctness of Petitioner's interpretation, renders Section 2 void.

The Constitution of Texas, Article III, Sections 51, 52, 53 and 55,[2] prohibits the Legislature from authorizing any county to lend its credit, grant public money or thing of value to a corporation, grant extra compensation after service has been rendered or a contract has been performed in whole or in part, or pay any claim created under any contract made without authority of law. To construe Section 2 as imposing a retrospective obligation on Respondent to pay Petitioner's claim under the void contracts would *authorize payment of a claim created under a contract made without authority of law and constitute a grant of public money to a corporation.*

A. Tex. Const. Section 53, Article III.

This section provides:

> "*The Legislature shall have no power to* grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor *authorize*

[2] Quoted in Appendix, pp. 1a-4a.

the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law."

The court below held that Respondent did not have power to make the contracts relied upon by Petitioner. The claim of Petitioner for payment is thus a claim against a county under a contract *made without authority of law.* Under the express and mandatory language of Section 53, the Legislature has no power, by validating act or otherwise, to authorize payment of a claim against Respondent, a county, under any agreement "made without authority of law." An attempt to validate or ratify the contract is nothing but an authorization to pay a claim in violation of Section 53. *Empire Gas & Fuel Co.* v. *State*, 47 S.W. 2d 265 (Tex. Sup. 1932); *Ussery* v. *City of Laredo*, 65 Tex. 406 (1886); *State* v. *Haldeman*, 163 S.W. 1020 (Tex. Civ. App. 1913, error ref.); *Shelby County* v. *Gibson*, 44 S.W. 302 (Tex. Civ. App. 1898, error ref.).

Although all of these authorities do not directly construe the prohibition against authorizing payment of a claim created under a contract made without authority of law, they illustrate the strict construction applied to Section 53, and the cases construing Tex. Const. Section 44, Article III, providing a similar prohibition as to claims against the State, manifest that Petitioner's construction of Section 2 of the Act of 1963 violates Section 53.

B. Tex. Const. Section 44, Article III.

Section 53, Article III "places similar restrictions on the Legislature with respect to counties and municipal corporations as is placed by Section 44, Article III[3] on the state as to state officers and contractors and state claims." Interpre-

[3] See Appendix, p. 1a.

tative Commentary, Vernon's Texas Constitution, Volume 1, page 736, Section 44 provides in pertinent part:

> "The Legislature * * * shall not * * * grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; * * *."

Comparison of Section 44 and Section 53 shows that each, in different language, has the common purpose of prohibiting the Legislature from paying, or authorizing payment, of any claim against the State or a county which is founded on a contract, or other alleged obligation, made without authority of statutory or common law. *Fort Worth Cavalry Club, Inc.* v. *Sheppard*, 83 S.W. 2d 660 (Tex. Sup. 1935); *Austin Nat. Bank* v. *Sheppard*, 71 S.W. 2d 242 (Tex. Sup. 1934); *Corsicana Cotton Mills, Inc.* v. *Sheppard*, 71 S.W. 2d 247 (Tex. Sup. 1934); *Empire Gas & Fuel Co.* v. *State*, 47 S.W. 2d 265 (Tex. Sup. 1932); *State* v. *Wilson*, 9 S.W. 155 (Tex. Sup. 1888); *Matkins* v. *State*, 123 S.W. 2d 953 (Tex. Civ. App. 1939, error dism.); *State* v. *Haldeman*, 163 S.W. 1020 (Tex. Civ. App. 1913, error ref.).

The meaning of Section 44 is declared in *Austin Nat. Bank*:

> "By its express words the constitutional provision under consideration in no uncertain terms prohibits the Legislature from appropriating state money to 'any individual' unless such appropriation shall have been provided for by a 'pre-existing law.' We interpret this to mean that the *Legislature cannot appropriate state money to 'any individual' unless, at the very time the appropriation is made, there is already in force some valid law constituting the claim the appropriation is made to pay a legal and valid obligation of the state. By legal obligation is meant such an obligation as would*

> *form the basis of a judgment against the state in a court of competent jurisdiction in the event it should permit itself to be sued.*" (Emphasis supplied)

These authorities make it clear that the prohibitions against the Legislature paying any claim "when the same shall not have been provided for by pre-existing law" or paying or authorizing the payment of any claim created against any county "under any agreement or contract, made without authority of law", have the same meaning — the Legislature is prohibited from paying or authorizing payment of any claim which did not constitute a legal obligation at the time of its creation. Respondent's alleged contracts were made without authority of law and created no legal obligation against Respondent. Applying the authorities construing Section 44 to the language of Section 53 having the same purpose, it is manifest that Section 2 of the Act of 1963 is void insofar as it attempts to authorize payment of Petitioner's claim.

C. Tex. Const., Article III, Section 52.

This Section provides in pertinent part:

> "The Legislature shall have no power to authorize any county, city, town or political corporation or subdivision of the State, * * * to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever * * *."

The Legislature "shall have no power to authorize any county . . . to grant public money or thing of value in aid of or to any . . . corporation whatsoever." To construe the Act of 1963 as compelling Respondent to pay Petitioner under an agreement *creating no liability* would authorize a grant of public money to a corporation in violation of this section. *Tompkins* v. *Williams*, 62 S.W. 2d 70 (Tex.

Comm. App. 1933). The governing body of the City of Dallas ordered the City Auditor to pay Mrs. Williams damages for injuries sustained when she was struck by a motorcycle ridden by a city policeman. Upon the auditor's refusal, Mrs. Williams sought a writ of mandamus. Holding that the injuries resulted from a governmental function of the city, the court denied the claim, saying:

> "It is the settled law of this state that a city is not liable for injuries inflicted through the negligence of its officers and employees in the exercise of governmental functions. City of Wichita Falls v. Robison (Tex. Sup.) 46 S.W. (2d) 965 and authorities there cited. It follows that there was absolutely no consideration for the entry of the order of December 21, 1928, ordering the payment of this claim. *In other words, the payment of this claim would have constituted, in so far as any legal liability was concerned, a pure gift or donation. Such would be in violation of sections 51 and 52 of article 3 of our state Constitution.*" (Emphasis supplied).

Inasmuch as Respondent is not liable under the alleged agreements, if the Act of 1963 is construed to compel payment thereunder, the payment would be "a pure gift or donation . . . in violation of Sections 51 and 52 of Article 3 of our state Constitution."

D. Tex. Const., Section 55, Article III.

This Section provides in part:

> "The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State or to any county or defined subdivison thereof, or other municipal corporation therein, * * *."

This section is the converse of Sections 44 and 53. These sections prohibit the payment of any claim which is not a

legal obligation, and Section 55 prohibits the release of any obligation to the State or political subdivision. The judicial construction of Section 55 proves that the Legislature can neither release an obligation to a county or create an obligation against the county under a contract made without authority of law. *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960); *Empire Gas & Fuel Co.* v. *State*, 47 S.W. 2d 265 (Tex. Sup. 1932); and *Ollivier* v. *City of Houston*, 54 S.W. 943 (Tex. Sup. 1900).

In *State* v. *City of Austin* (belatedly relied upon by Petitioner) the State contended that Vernon's Ann. Civ. Stat., Article 6674w-4, authorizing the State to pay for relocation of utilities on *interstate* highways, was a release of an obligation in violation of Article III, Section 55, and a grant of public money in violation of Section 51, Article III. The Texas Supreme Court held that, since the statute operated *prospectively*, it was not subject to these objections, but that if it had operated *retrospectively*, it would be void, saying:

> "Many city ordinances as well as several of our statutes authorizing utility companies and municipal corporations to erect their lines along and upon public roads and streets stipulate that the owner of the facility may be required to relocate the same at its own expense so as to permit road and street improvements. See Articles 1433, 1433a, 1436a, and 1436b, Vernon's Ann. Tex. Civ. Stat. These statutes and ordinances express the public policy of the state as it existed at the time of their adoption. Subject to constitutional limitations, however, that policy may be changed by the Legislature at any time.
>
> • • •
>
> *After the occurrence of events which under the law then existing give rise to an obligation on the part of an individual or corporation to the state, the Legislature has no power to release or diminish that obligation without consideration.* Empire Gas & Fuel Co. v. State,

121 Tex. 138, 47 S.W. 2d 265. See also Delta County v. Blackburn, 100 Tex. 51, 93 S.W. 419. *Moreover, the use of public money to pay a claim predicated on facts which generate no state liability constitutes a gift or donation in violation of our Constitution.* See Tompkins v. Williams, Tex. Com. App., 62 S.W. 2d 70. Respondents could not, therefore, be reimbursed for all or any part of the expense incurred by them in relocating their lines prior to the adoption of House Bill 179. But the statute does not operate *retrospectively*, and respondents claim no right to reimbursement for costs incurred before it became effective.

* * *

"Respondents benefit from the statute only in the sense that they are relieved of a financial burden which they could be required to bear. The question to be decided then is whether the use of public funds to pay part or all of the loss or expense to which an individual or corporation is subjected by the state in the exercise of its police power is an unconstitutional donation for a private purpose. *We think not provided the statute creating the right of reimbursement operates prospectively*, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious." (Emphasis supplied).

As construed by Petitioner, Section 2 of the Act of 1963 purports to operate *retrospectively* to create an obligation against Respondent and requires the donation of public funds. The inescapable conclusion is that, if Section 2 of the Act of 1963 is construed, as Petitioner urges, to impose an obligation on Respondent to pay a claim created under the contracts made without authority of law, it is void.

II.

PETITIONER'S CONSTRUCTION OF THE ACT IS ERRONEOUS

Petitioner finds an intent in Sections 1 and 2 of the Act of 1963 which eludes Respondent. Section 1 does not provide that the cost of relocating or adjusting utility facilities

under contracts by counties to pay for such cost is declared to be an expense of right-of-way acquisition, but states that *in the acquisition of highway rights-of-way for the Texas Highway Department*, such cost is declared to be an expense of the right-of-way acquisition. Payment of the cost of utility adjustment as an incident of acquiring the utility's easement is not payment of the cost of utility adjustment under a contract providing for that alone. The Department did not request Respondent to purchase or condemn Petitioner's easements, and Respondent made no effort to acquire such easements (R. 66). Under these facts, Sections 1 and 2 are not applicable.

The only cost declared to be an expense of right-of-way acquisition is that "which . . . may be eligible under the law." When is a cost eligible under the law? The only reference in previous statutes to a cost being eligible is in Vernon's Ann. Civ. Stat. Article 6674w-4, providing that the relocation of a utility on an *interstate highway* shall be made "at the cost and expense of the State of Texas provided that such relocation is eligible for Federal participation." *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960). The highways involved here were not a part of the Federal or Interstate Highway System. Moreover, Vernon's Ann. Civ. Stat., Article 1436b[4] requires a utility to relocate its pipes on new right-of-way at its own expense.

Section 2 states that contracts made by counties "for the purposes stated above" are ratified and validated. The only purpose "stated above" is the acquisition of highway rights-of-way. Section 1 makes no reference to a contract relating only to the payment of the cost of utility relocation or adjustment.

Petitioner assumes a meaning not in the Act and predicates its entire reply brief on such assumption.

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[4] Brief in Opposition, Appendix A, pp. 33, 34.

III.

EMERGENCY CLAUSE OF ACT OF 1963

Section 4 of the Act finds an emergency from "the fact that the provisions of this act are necessary in order to clarify existing law." Petitioner urges that this "shows the law of the State of Texas existing at the time of the Court of Appeals' decision." In Texas, "a legislative construction is not controlling; on the other hand, it is entitled to very little weight," *City of Waco* v. *McCraw*, 93 S.W. 2d 717, 719 (Tex. Sup. 1936), "a legislative construction of an act of another legislature is uniformly held to be entitled to little weight," *Federal Crude Oil Co.* v. *Yount-Lee Oil Co.*, 52 S.W. 2d 56, 63 (Tex. Sup. 1932), and "a legislature may not construe a former law so as to give such construction a retroactive operation," *Snyder* v. *Compton*, 28 S.W. 1061 (Tex. Sup. 1894).

CONCLUSION

For the foregoing reasons and the reasons stated in the Brief in Opposition, Respondent submits that the Petition for Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, Hardin County, a member of the Bar of the Supreme Court of the United States, certifies that a copy of the foregoing brief has been served upon Petitioner, Trunkline Gas Company, by delivering same to Mr. Cecil N. Cook, 1100 Esperson Building, Houston 2, Texas, Counsel for Petitioner, in person, this ..... day of July, 1963.

.....

William Robert Smith

Counsel for Respondent

APPENDIX

Constitutional Provisions

Tex. Const. Art. III, Sec. 44 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVI)

The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law.

Tex. Const. Art. III, Sec. 51 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XVII)

The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided, however, the Legislature may grant aid to indigent and disabled Confederate soldiers and sailors under such regulations and limitations as may be deemed by the Legislature as expedient, and to their widows in indigent circumstances under such regulations and limitations as may be deemed by the Legislature as expedient; to indigent and disabled soldiers, who, under special laws of the State of Texas, during the war between the States, served in organizations for the protection of the frontier against Indian raids or Mexican marauders, and to indigent and disabled soldiers of the

militia who were in active service during the war between the States, and to the widows of such soldiers who are in indigent circumstances, and who are or may be eligible to receive aid under such regulations and limitations as may be deemed by the Legislature as expedient; and also grant for the establishment and maintenance of a home for said soldiers and sailors, their wives and widows and women who aided in the Confederacy, under such regulations and limitations as may be provided for by law; provided the Legislature may provide for husband and wife to remain together in the home. There is hereby levied in addition to all other taxes heretofore permitted by the Constitution of Texas, a State ad valorem tax on property of seven ($.07) cents on the one hundred ($100) dollars valuation for the purpose of creating a special fund for the payment of pensions for services in the Confederate army and navy, frontier organizations and the militia of the State of Texas, and for the widows of such soldiers serving in said armies, navies, organizations or militia; provided that the Legislature may reduce the tax rate herein levied, and provided further, that the provisions of this section shall not be construed so as to prevent the grant of aid in cases of public calamity.

Tex. Const. Art. III, Sec. 52 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVIII)

The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company; provided, however, that under legislative provision any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the State, or any

defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include, towns, villages or municipal corporations, upon a vote of a two thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes to wit:

(a) The improvement of rivers, creeks, and streams to prevent overflows, and to permit of navigation thereof, or irrigation thereof, or in aid of such purposes.

(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof.

(c) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.

Tex. Const. Art. III, Sec. 53 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVIII)

The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment

of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

Tex. Const. Art. III, Sec. 55 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVIII)

The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State or to any county or defined subdivision thereof, or other municipal corporation therein, except delinquent taxes which have been due for a period of at least ten years.

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